84-20 (2)

No.

In the Supreme Court of the United States

October Term, 1983

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher Oil Company,
Petitioners,

vs.

GULF OIL CORPORATION,
Respondent.

Appendix to
Petition for a Writ of Certiorari
To the Temporary Emergency
Court of Appeals of the United States

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TEMPORARY EMERGENCY
COURT OF APPEALS
OF THE
UNITED STATES

Nos. 9-80, 9-81

GULF OIL CORPORATION,
DEFENDANT-APPELLANT and CROSS-APPELLEE,

v.

RICHARD W. DYKE, dba WESTERN STATIONS CO.,
COLVIN OIL COMPANY, and F. O. FLETCHER, INC.,
dba FLETCHER OIL COMPANY,
PLAINTIFFS-APPELLEES and CROSS-APPELLANTS,

UNITED STATES OF AMERICA,
INTERVENOR

Appeals from the United States District Court
for the District of Oregon
(Nos. 77-10-PA, 77-791-PA, 77-849-PA)

(Argued: March 19, 1984 Decided: April 17, 1984)

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WILLIAM H. BODE, JOHN E. VARNUM and TOBEY B. MARZOUK, Spriggs, Bode & Hollingsworth, Washington, D.C., on the brief for Amici Curiae, Independent Oil and Tire Co., Shepherd Brothers Service Stations, and U.S. Oil Company, Inc.

JOHN A. EVANS, Marathon Petroleum Company, Findlay, Ohio; WILLIAM C. STREETS and GAIL F. SCHULZ, Mobil Oil Corporation, Fairfax, Virginia; R. BRUCE MCLEAN, P.C., DANIEL JOSEPH, P.C., WARREN E. CONNELLY, P.C., and DAVID A. HOLZWORTH, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C. on the brief for Amici Curiae, Marathon Petroleum Company and Mobil Oil Corporation.

Before CHRISTENSEN, ESTES, and ZIRPOLI, Judges.

Majority opinion filed by Judge Estes.

Concurring opinion filed by Judge Christensen.*

Concurring and dissenting opinion filed by Judge Zirpoli.*

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*Opinions filed April 27, 1984.

ESTES, Judge:

This is an action for overcharges under § 210(b) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note, as incorporated in the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 et seq. brought by Plaintiffs-Appellees and Cross-Appellants Richard W. Dyke, dba Western Stations Co., Colvin Oil Company, and F. O. Fletcher, Inc., dba Fletcher Oil Company (hereinafter "Dyke" when referred to collectively; "Richard W. Dyke" when referring to plaintiff Dyke singularly), against Defendant-Appellant and Cross-Appellee Gulf Oil Corporation (hereinafter "Gulf").[1] Gulf also filed a

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[1] Independent Oil and Tire Co., Shepherd Brothers Service Stations and U.S. Oil Company, Inc. have filed a joint brief as Amici Curiae on the prejudgment interest and attorneys' fees questions presented by this appeal.

counterclaim for unpaid bills for gasoline in the sum of $728,753.78 against Richard W. Dyke only,[2] which was not contested.[3] Dyke alleged that Gulf overcharged it in sales of gasoline from Gulf to Dyke between January 1974 and January 1977. An Amended Judgment entered on September 12, 1983[4] in the United States District Court for the District of Oregon was awarded to plaintiffs against Gulf in amounts as follows:

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[2] Record at Vol. 1, Tab 2.

[3] Record at Vol. 1, Tab 3, p. 1.

[4] Record at Vol. 11, Tab 161. The Original Judgment entered August 25, 1983 (Id. at Tab 157) and first Amended Judgment entered August 26, 1983 (Id. at Tab 158) were set aside by Order of September 2, 1983 (Id. at Tab 160).

	Overcharges	Prejudgment Interest	Attorney's Fees
Richard W. Dyke, dba Western Stations Co.	$1,264,555.22	$ 557,588.38	$385,500
Colvin Oil Company	745,000.00	200,568.99	173,500
F.O. Fletcher, Inc., dba Fletcher Oil Company	790,000.00	408,471.69	191,000
	$2,799,555.22	$1,166,629.06	$750,000

In addition to the $4,716,184.28, total of the above sums, the Amended Judgment also awarded costs and post-judgment interest to plaintiffs at the rate of 10.58 percent against Gulf. Gulf appeals from this judgment. Dyke has filed a cross-appeal contending the district court incorrectly computed the prejudgment interest which Dyke was awarded.

In October of 1972, Gulf's board of directors decided to divest Gulf of all its marketing activities in its San Francisco Retail Marketing District, which included northern California, northern Nevada,

Oregon and Washington. The decision to divest followed losses by Gulf of $31.7 million in 1971 and $37 million in 1972 in the Northwest.[5] The passage of the EPAA, however, forced Gulf to continue to supply its customers in the area and to place its purchasers into classes which would maintain the customary price differentials in existence on May 15, 1973.[6] Gulf continued to supply all of its jobber customers in the area, but converted all of the branded jobbers[7] to unbranded jobbers on January 1, 1974. Before 1974, Gulf had supplied only

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[5] Findings of Fact and Conclusions of Law ("FFCL"), Record at Vol. 11, Tab 147, pp. 4-5.

[6] 10 C.F.R. § 212.

[7] Gulf's branded jobbers received free painting of service stations, hauling allowances and the privilege of honoring Gulf credit cards. FFCL, supra, at 4. Dyke and Colvin were Gulf branded jobbers before January 1, 1974. Id.

one jobber in the district on an unbranded basis.[8]

On May 15, 1973, Richard W. Dyke, Colvin, and Fletcher all purchased gasoline from Gulf as resellers-retailers as defined in 10 C.F.R. § 212.31. Gulf was a refiner as defined in the same section. Richard W. Dyke and Colvin were among those purchasers who were branded jobbers on May 15, 1973 and converted to unbranded jobbers on January 1, 1974.

The other jobbers in the district who were reclassified from branded to unbranded on January 1, 1974, were placed in the Armour class of purchaser to reflect their new status. Richard W. Dyke and Colvin, however, were given base prices reflecting those published in _Platt's_ _Oilgram_ for May 15, 1973 for Portland and Eugene,

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[8] FFCL, _supra_, at 5-6. The unbranded jobber was Armour Oil Co., which purchased gasoline from Gulf's northern California terminals only. _Id._

Oregon and Seattle/Tacoma, Washington. Gulf reasoned that its jobbers in Oregon and Washington comprised a substantially different market from those in northern California and should constitute a separate class with a different base price. Gulf relied on the new item/new market rule[9] to justify its use of Platt's Oilgram in establishing a base price for Richard W. Dyke and Colvin, which is an exception to the rule that base prices must correspond to a price actually charged the most similar existing class on May 15, 1973.[10]

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[9]FFCL, *supra*, at 11. The new item-new market rule, 10 C.F.R. § 212.111, allowed sellers to use a market price as the base price for a product in certain instances rather than the price actually charged the most similar class of purchasers on May 15, 1973. Gulf later conceded that its use of the new item-new market rule was improper. FFCL, *supra*, at 11.

[10]*Pacific Supply Co-Op v. Shell Oil Co.*, 697 F.2d 1084 (Em.App. 1982).

Richard W. Dyke filed a complaint on January 4, 1977 and ceased paying for gasoline received from Gulf on December 16, 1976, yet continued to receive gasoline without payment until January 28, 1977. Colvin's complaint was filed on October 11, 1977. Fletcher filed its complaint on October 20, 1977. The three cases were consolidated, with Richard W. Dyke proceeding to judgment first. The decision and findings in Richard W. Dyke were binding on Colvin and Fletcher.

The case was originally assigned to Chief Judge Skopil.[11] An interlocutory appeal was filed by the Department of Energy ("DOE") contesting their joinder in the cases. The DOE was released from further participation in the cases by this Court's decision and mandate and the

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[11] FFCL, supra, at 12, fn. 2.

district court order which followed.[12] On remand, new Chief Judge Burns granted a six-month stay in the proceedings before Judge Owen M. Panner was assigned to the cases in July, 1980.[13] Judge Panner lifted the stay on July 21, 1980.[14]

Trial before the court began on November 17, 1981. The trial was conducted in stages with succeeding orders entered as follows: In Phase 1, Gulf's use of the Platt's Oilgram prices as base prices for the plaintiffs was held improper. November 17, 1981; Record at Vol. 4, Tab 47. In Phase 2, the unbranded Armour class of purchasers and its corresponding

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[12]Record at Vol. 1, Tab 8, June 29, 1979; Record at Vol. 17, Tab 263, August 16, 1979. See, Dyke v. Gulf Oil Corp., 601 F.2d 557 (Em.App. 1979).

[13]FFCL, supra, at 12, n. 2. Judge Panner began duty as U.S. District Judge on March 24, 1980.

[14]Record at Vol. 1, Tab 14.

base price was held proper for the plaintiffs. November 20, 1981; Record at Vol. 4, Tab 49. In Phase 3, the method of calculating the overcharges was decided, prejudgment interest was awarded to the plaintiffs, and the selection of the appropriate statute of limitations was made. January 20, 1982; Record at Vol. 7, Tab 67. In Phase 4, plaintiff Fletcher was held to be the real party in interest. April 15, 1982; Record at Vol. 7, Tab 80. In Phase 5, attorney's fees were awarded the plaintiffs. May 27, 1982; Record at Vol. 8, Tab 93.

The calculation of prejudgment interest was referred to a magistrate on June 1, 1982.[15] The magistrate entered his Findings and Recommendations on September 9, 1982, and they were adopted by

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[15] Record at Vol. 8, Tab 94.

the district court on October 26, 1982.[16] The district court entered its Findings of Fact and Conclusions of Law on June 20, 1983[17] and filed a separate opinion on the issue of attorney's fees on August 23, 1983.[18] The Amended Judgment was entered on September 12, 1983.[19] Gulf filed its Notice of Appeal in this Court on October 6, 1983. Dyke filed its Notice of Cross-Appeal in this Court on October 20, 1983.

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[16]Record at Vol. 9, Tab 126; Vol. 10, Tab 129.

[17]Record at Vol. 11, Tab 147.

[18]Record at Vol. 11, Tab 155.

[19]Record at Vol. 11, Tab 161.

ISSUES

The issues on appeal, as stated by Gulf in its brief filed November 14, 1983, are as follows:

1. Whether overcharges can be refunded under the EPAA without any determination that sales exceeded the "maximum allowable prices" permitted under the governing Refiner Price Rule;

2. Whether prejudgment interest can ever be awarded on overcharge refunds under the EPAA;

3. If such prejudgment interest is ever recoverable, whether it can be awarded where the amount of overcharges to be refunded was unliquidated and became certain only by trial;

4. Whether attorney's fees may be awarded under the EPAA where the overcharges were found to be unintentional;

5. Whether attorney's fees awardable under the EPAA may substantially exceed those actually charged;

6. Whether appellee Fletcher lacks standing as an indirect purchaser to sue Gulf for overcharges under the EPAA;

7. Whether application of the two-year Washington statute of limitations to Fletcher frustrates national policy under the EPAA;

8. Whether the passing-on defense is available in this EPAA case because all parties were subject to Federal Price Regulations, and the trial court specifically quantified the amount of overcharges actually passed through; and

9. Whether the trial court abused its discretion by making a class of purchaser determination contrary to the Pretrial Order without considering evidence

offered in support of a motion to reopen trial of that issue.[20]

Dyke states in its brief that the issue on the cross-appeal is: Whether the Trial Court erred in its calculation of prejudgment interest.[21]

Gulf's Motion to Dismiss

Gulf, without raising the question in the lower court, was given leave to file an untimely Motion to Dismiss the Cross Appeal of Dyke, which challenges the subject-matter jurisdiction of this Court following the recent Supreme Court decision in I.N.S. v. Chadha, ____ U.S. ____, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). Dyke has opposed the motion and contended that the Chadha decision did not invalidate the

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[20] Brief of Defendant-Appellant and Cross-Appellee Gulf ("Gulf's Br.") at 3-4.

[21] Brief of Plaintiffs-Appellees and Cross-Appellants Dyke, et al. ("Dyke's Br.") at 1.

statutes. The United States has filed a motion to intervene on the question of the constitutionality of the statutes pursuant to 28 U.S.C. § 2403 and has also argued that the statutes remain valid.[22] Gulf contends that because the applicable statutes granting jurisdiction to this Court contain inseverable and unconstitutional legislative veto provisions, the legislation is void and this Court has no jurisdiction over the cross-appeal. It has been determined that Gulf's motion raises a jurisdictional

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[22] Marathon Petroleum Company and Mobil Oil Corporation have filed a joint brief as Amici Curiae in support of Gulf's position that this case should be dismissed for lack of subject-matter jurisdiction.

question which we must decide.[23] After

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[23]Gulf has placed itself in the anomalous position of moving to dismiss only Dyke's cross-appeal on the basis that the statutory authority for the cross-appeal is unconstitutional. Since Gulf's appeal also depends on the validity of the EPAA and EPCA, any holding of this Court dismissing the cross-appeal because of the unconstitutionality of the EPAA or EPCA would also necessitate the dismissal of Gulf's appeal. Dyke has maintained that the constitutional issues raised by Gulf are not in reality directed at the subject-matter jurisdiction of this Court, but rather at the decision on the merits of the District Court below. See, Memorandum filed by Dyke, et al., December 28, 1983 and Memorandum filed by Dyke, et al., January 10, 1984. Dyke maintains that such an argument must first be raised in the District Court below. See, United States v. Empire Gas Corp. 547 F.2d 1147, 1153 (Em.App. 1976), cert. denied, 430 U.S. 915, 97 S.Ct. 1326, 51 L.Ed.2d 592. Gulf's motion does have such bearing on the subject-matter jurisdiction and the very viability of this Court as to mandate consideration here. We have a "duty to observe questions relating to jurisdiction whenever they may appear." McWhirter Distributing Co. v. Texaco, Inc., 668 F.2d 511, 525 n. 22 (Em.App. 1981), citing Condor Operating Co. v. Sawhill, 514 F.2d 351, 354 (Em.App., cert. denied, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975)). See also, Exxon Corp. v. F.E.A., 516 F.2d 1397 (Em.App. 1975).

examination of the statutes, their legislative histories, prior decisions and the arguments of counsel, we conclude that the unconstitutional legislative vetoes contained in the EPAA and EPCA are severable, leaving the remaining sections of the legislation intact and operable, including the sections conferring jurisdiction of this appeal upon this Court.

Neither the EPAA nor the EPCA contains a severability clause.[24] The absence of such a clause, however, is in no way dispositive of the question of severability. E.E.O.C. v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984). Indeed, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." United States v. Jackson, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 1218, 20 L.Ed. 138

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[24] However, the ESA, which was the precursor of the EPAA and EPCA, does contain a severability clause at Section 220. We are also most persuaded by the language of Section 211(g) of the ESA that Congress intended this Court to sever unconstitutional portions of the statutes and leave the remainder intact: "[T]he Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation issued under this title." (Emphasis Added.) This Court was given full authority to determine the unconstitutionality of one provision of a statute without the requirement of invalidating the whole statute as a result.

(1968). The proper test is that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062 (1932).

In order to determine whether Congress would have enacted the remainder of the EPAA and EPCA had it known that the one-house veto provisions were unconstitutional, we must examine the language and legislative history of the Acts. E.E.O.C. v. Hernando Bank, supra, at 1190; Muller Optical Co. v. E.E.O.C., 574 F.Supp. 946 (W.D. Tenn. 1983).

"Congressional intent and purpose are best determined by an analysis of the

language of the statute in question."
E.E.O.C. v. Hernando Bank, supra, at 1190.

The stated purpose of the EPAA is as follows:

> Sec. 2 . . . --
>
> (b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

The EPAA also states that it was enacted in the midst of circumstances which "constitute a national crisis which is a threat to the public health, safety, and welfare," EPAA § 2(1), and that its purpose is to provide for "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all . . . sectors of the

petroleum industry." EPAA, as amended, 15 U.S.C. § 753(b)(1)(F) _quoted_ _in_ _United States_ _v._ _Heller_, 726 F.2d 756 (Em.App. 1983). [Emphasis added.]

The purpose of the EPCA is stated, in part, in the Act as follows:

> Sec. 2. The purposes of this Act are --
>
> (1) to grant specific standby authority to the President, subject to congressional review, to impose rationing, to reduce demand for energy through the implementation of energy conservation plans, and to fulfill obligations of the United States under the international energy program. . . .

While the stated purposes of the EPCA include a reference to the congressional veto, it does not follow that the veto provisions are inseverable. The intention of Congress to review the President's actions through the veto is obvious from the face of the legislation. Our task is to determine "whether Congress would have enacted the remainder of the statute[s]

without the unconstitutional [veto] provisions." Consumer Energy Council of America v. F.E.R.C., 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd sub nom, ___ U.S. ___, 103 S.Ct. 3556, 77 L.Ed.2d 1402 (1983).

Gulf cites numerous portions of the legislative history in an attempt to prove that the compromise between the flexibility desired by the Executive and the oversight demanded by Congress was an extremely fragile one which could not have been enacted absent the legislative veto provisions. In none of these references, however, do we find a clear indication that the EPAA or EPCA would not have been passed without such vetoes. E.E.O.C. v. Hernando bank, supra, at 1191. The mere presence of continued and heated debates prior to the passage of the Acts cannot provide the evidence necessary for us to conclude that the legislative vetoes are inseverable and

that the sections in which they appear, as well as the sections conferring jurisdiction on this Court, must be invalidated. See, Allen v. Carmen, ____ F.Supp. ____, No. 83-3099 (D.D.C., Dec. 30, 1983), and United States v. Sutton, ____ F.Supp. ____, No. 82-C-1069-BT (N.D. Okla. Apr. 4, 1984).

We also are not persuaded by the reference to the veto provisions in the legislative history which describe their operation. Such descriptions are not helpful in determining what Congress would have intended had it known the legislative vetoes were invalid. Consumer Energy Council of America v. F.E.R.C., supra, 673 F.2d at 442. We therefore conclude that it is not evident that Congress would have declined to enact the EPAA and EPCA without the legislative veto provisions.

We reach this conclusion because, contrary to Gulf's contention, the question

is not whether Congress would have enacted these _exact_ statutes had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all.

We must next determine if what remains in the Acts is "fully operative as a law." _Buckley v. Valeo_, _supra_, 424 U.S. at 109, 96 S.Ct. at 564. The legislative veto provision of the EPAA appears in

Section 4(g)(2).[25] Once the veto is severed, the remainder of Section 4(g)(2) gives the President limited decontrol authority over crude oil, residual fuel oil, or any refined petroleum product after making specific findings that regulation of such oil or product is no longer necessary under the Act, that no shortage exists and that exempting such oil or product will not have an adverse impact on the supply of other oil or products. Without the veto,

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[25] The veto provision of Section 4(g)(2) of the EPAA is as follows:

> Such as amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; <u>except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment</u>. (Emphasis added.)

Section 4(g)(2) is "fully operative as a law." Id.

Similarly, the legislative veto provisions contained in the EPCA, once removed, leave the remainder of the Act "fully operative as a law." Id. In fact, the hard-fought compromise between the Executive and Congress over pricing and decontrol, which Gulf contends demonstrates the inseverability of the vetoes, is maintained after severance. Without the vetoes, Sections 401 and 455 of the EPCA resemble "report and wait" procedures

specifically approved in Chadha.[26] I.N.S. v. Chadha, supra, 103 S.Ct. at 2776 n. 9, and Sibbach v. Wilson & Co., 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941).

From the beginning of price controls under federal statutes and regulations, courts have resolved challenges to their constitutionality. See, Amalgamated Meat Cutters and Butcher Workers of North America v. Connally, 336 F.Supp. 737

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[26] Either House of Congress could unilaterally veto an amendment proposed by the President by following the procedures for congressional review contained in § 551 of the EPCA. When the legislative veto in § 551(c)(1) is excised from the section a fully workable "report and wait" procedure is preserved. The President could still propose an amendment to the Congress, but Congress would be able to prevent its effectiveness by passing legislation contrary to the amendment within specified time periods. Thus, Congress would still retain the opportunity to review Presidential proposals, but would only be able to disapprove of such actions through use of the constitutional legislative process. Such a procedure is not only workable, but preserves to the greatest extent possible the compromise between Congress and the Executive intended in the legislation.

(D.D.C. 1971); Consumers Union of U.S., Inc., v. Sawhill, 525 F.2d 1068 (Em.App. 1975). These challenges have escalated enormously since the enactment of the EPAA and EPCA. See, Condor Operating Co. v. Sawhill, 514 F.2d 351 (Em.App.), cert. denied, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975); Cities Service Co. v. F.E.A., 529 F.2d 1016 (Em.App. 1975), cert. denied, 426 U.S. 947 (1976), the authorities therein, and their progeny. The scope of these attacks has been unreasonably broad. The statutes have been upheld because "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Block v. Hirsh, 256 U.S. 135, 65 L.Ed. 865 (1921). As the program under the law winds down in the wake of decontrol, this latest and broadest attack also is without merit.

Therefore, we conclude that the unconstitutional legislative veto provisions of the EPAA and EPCA are severable, leaving the remainder of the Acts intact and with no effect on this Court's jurisdiction. Gulf's Motion to Dismiss the Cross-Appeal is DENIED.

Computation of Maximum Allowable Price in Determining Overcharges

Gulf contends that the District Court did not determine that its prices charged to Dyke exceeded the "maximum allowable price." Such a finding, Gulf states, is necessary before concluding that overcharges have occurred. "Maximum allowable price" is defined in the regulations as:

> ". . . the weighted average price at which the covered product was lawfully priced on May 15, 1973, computed in accordance with the provision of [10 C.F.R.] § 212.83(a), plus increased product costs and increased non-product costs

incurred between the month of measurement and the month of May 1973." 10 C.F.R. § 212.82.

See also, Wellven, Inc. v. Gulf Oil Corp., ____ F.2d ____, Nos. 3-35, 3-36 (Em.App. Feb. 10, 1984).

Gulf cites our decision in Longview Refining Co. v. Shore, 554 F.2d 1006 (Em.App. 1977), cert. denied, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977), as requiring specific findings by the district court establishing the existence of overcharges in a sum certain before a plaintiff may recover. 554 F.2d at 1012. While such specific findings are indeed required by Longview, the findings which supposedly established the maximum allowable price in Longview were "defectively general and all-inclusive." Id. at 1018. We hold that the District Court's findings and method of computing overcharges in this case, although erroneous as to class of purchaser base

price for reasons hereafter to be discussed, were otherwise sufficient under the regulations.

The District Judge used the following formula to compute overcharges:

> "The proper method in this case for calculating the overcharges is to subtract the court-ordered May 15, 1973 prices to Dyke from the May 15, 1973 prices imputed to Dyke based on Platt's Oilgram. If Gulf did not actually pass through its full cost increment to Dyke in a month, the cost increment difference is to be subtracted from the overcharge calculated on May 15 prices. The difference shall be multiplied by the volume of each grade of gasoline sold to Dyke in each month. . . ." FFCL, Record at Vol. 11, Tab 147, p. 19.

Using this formula, the parties then stipulated the amount of the overcharges. Id. at p. 20.

This method employs both May 15, 1973 base prices and Gulf's stated increased costs to arrive at the maximum allowable price. Using the figures provided by Gulf,

the district court was able to determine the costs Gulf elected to pass through each month[27] as well as the dates on which Gulf did not charge Dyke the full amount of increased costs available.[28] Gulf was given credit for these undercharges to Dyke in computing total overcharges. Thus the findings sufficiently found all of the elements of the maximum allowable price calculations as a basis for determining that sales exceeded the "maximum allowable prices" permitted under the governing Refiner Price Rule.

Prejudgment Interest

We hold that this case is not an appropriate one in which to award prejudgment interest. Accordingly, we need not reach the question of whether

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[27]Record at Vol. 17, Tab 292.

[28]Id.

prejudgment interest may ever be awarded in an overcharge case under the EPAA. Recently, we declined to award prejudgment interest in two cases because the amount claimed was not for a "liquidated or readily liquidatable sum." Eastern Air Lines, Inc. v. Atlantic Richfield Co., 712 F.2d 1402, 1410 (Em.App.), cert. denied, ____ U.S. ____, 104 S.Ct. 278, 78 L.Ed.2d 258 (1983); Zahir v. Shell Oil Co., 718 F.2d 1567, 1573 (Em.App. 1983). In addition, prejudgment interest is not appropriate in this case because the ultimate amount of the overcharge was the "subject of great uncertainty,"[29] requiring extensive testimony and arguments from counsel before the court could select even a method for calculating the alleged overcharges. Following our decision in Eastern Air Lines, supra, Gulf filed a

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[29]Eastern Air Lines, supra, at 1410.

motion to amend the Findings of Fact and Conclusions of Law to delete the award of prejudgment interest.[30] In an Order dated August 24, 1983, Judge Panner denied the motion, stating only, "The motion to deny an award of prejudgment interest is DENIED because Magistrate Juba was able to determine appropriate amounts with certainty. Therefore, Eastern Air Lines does not control."[31] While it is true that the magistrate was able to ultimately determine an amount certain to be applied as prejudgment interest following the judge's ruling, certainty in calculating interest on a definite sum is not what Zahir and Eastern require. Rather, we again hold that in this case, where the amount claimed to be due varied and was

[30] Record at Vol. 16, Tab 254.

[31] Record at Vol. 16, Tab 256, p. 2.

uncertain, it is "inequitable and unjust" to award prejudgment interest.[32]

Attorney's Fees

The district judge awarded Dyke $750,000 in attorney's fees,[33] finding that our recent decision of Eastern Air Lines, supra, was not controlling. In Eastern Air Lines, we conducted an extensive study of § 210(b) of the ESA[34] and the limitations on a judge's discretion in awarding attorney's fees imposed by that section:

> ". . . [T]o deprive the court of its discretionary power

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[32]Eastern Air Lines, supra, at 1410.

[33]Record at Vol. 11, Tab 161.

[34]Although the district judge stated that "TECA was not required in [Eastern Air Lines] to carefully analyze the language of the statute authorizing attorneys' fees" (Record at Vol. 11, Tab 155, p. 3), we believe our analysis in Eastern was thorough and is controlling.

to award treble damages and attorney's fees, the defendant making the overcharge must prove that (1) the overcharge was not intentional, and (2) the overcharge resulted from a bona fide error notwithstanding (3) the maintenance by the defendant of procedures reasonably adapted to the avoidance of such error.

"In the absence of such proof by the defendant the court in its discretion may award treble damages and attorney's fees if it finds the overcharge was intentional or resulted from reprehensible or criminal conduct, or lack of procedures reasonably adapted to the avoidance of erroneous overcharges, or bad faith, or where required by equity and the ends of justice." Eastern Air Lines, supra, at 1412; second paragraph quoted in, Wellven, Inc. v. Gulf Oil Corp., supra.

The Findings of Fact and Conclusions of Law contain the express finding that any overcharges by Gulf were not intentional. ". . . In light of the circumstances and lack of guidelines at the time Gulf's decision was made, I find that the

overcharges were not intentional." FFCL, Record at Vol. 11, Tab 147, pp. 21-22.[35]

In view of the findings made by the district judge that the overcharge was not intentional and, although not in the "precise language"[36] of § 210(b), the finding that Gulf maintained "procedures reasonably adapted to the avoidance" of an overcharge,[37] as well as our conclusion upon examination of the record that any overcharges were the result of a bona fide error, we hold that it was plain error to award any attorney's fees in this case. In

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[35] See also, Record at Vol. 25, Tab 329, p. 1158, l. 17. In Longview Refining Co. v. Shore, supra, at 1014, n. 20 (Em.App. 1977), this Court warned, "Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. Boyce Motor Lines v. United States, 342 U.S. 337, 72 S.Ct. 319, 96 L.Ed. 367 (1952);" also Standard Oil Co. v. D.O.E., 596 F.2d 1029, 1065, n. 87.

[36] Eastern Air Lines, supra, at 1412.

[37] Id.

any event, the amount of attorney's fees awarded here was so excessive as to constitute a clear abuse of discretion.[38]

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[38] Id. The attorney's fees awarded in this case were grossly excessive and a clear abuse of the judge's discretion. The last-submitted affidavit of plaintiff's counsel in support of the motion for attorney's fees included in the record reflects a requested bonus payment of $84,600.00. The requested fees were $397,641.60 and stated expenses were $17,289.76 The total of submitted fees, expenses and bonus through March 10, 1983 was $499,531.36. Record at Vol. 11, Tab 144. Judge Panner made an award of attorney's fees in the amount of $750,000.00, supra, and Record at Vol. 11, Tab 161, representing a bonus payment of $250,468.84 more than the total of fees, expenses and bonus in the affidavit. Including the bonus of $84,600.00 which was requested in the affidavit, the total bonus to plaintiffs' attorneys was $335,068.64. Additionally, the itemized billing statements submitted by plaintiffs' counsel include substantial charges made for the Amici Curiae brief filed on behalf of these plaintiffs on January 12, 1983 in Eastern Air Lines v. Atlantic Richfield Co., supra, before this Court. The Amici brief urged the same positions on the prejudgment interest and attorney's fees issues as plaintiffs have argued in the present case. In Eastern Air Lines, these positions were rejected by this Court.

Plaintiff Fletcher's Standing to Sue

Gulf claims that Plaintiff Fletcher has no standing to sue under ESA § 210 for overcharges because Fletcher was an indirect purchaser from Gulf. The contract for sale of gasoline was between Gulf and Tesoro Petroleum Corporation. Tesoro then resold the gasoline to Fletcher.[39] Section 210(b) of the ESA authorizes suits for overcharges ". . . against any person renting or selling goods or services who is found to have overcharged the plaintiff." [Emphasis added.] We hold that, on the basis of our examination of the record and as a matter of law, Fletcher was an indirect purchaser from Gulf. Indeed, plaintiffs' counsel classified Fletcher in

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[39] Fletcher paid Tesoro Gulf's sales price plus a fixed markup of $.00375 per gallon. FFCL, supra, at 14. We are not convinced that the "unique relationship" the district court found between Gulf, Tesoro and Fletcher (Id. at 12-15) requires a determination that Fletcher was anything other than an indirect purchaser from Gulf.

this statement to Judge Panner: "That's a question of whether Fletcher is entitled as a subjobber and has standing to bring this matter in the first place." Record at Vol. 21, Tab 325, p. 233, l. 21.

Fletcher was an indirect purchaser with no standing to sue for overcharges, and we so hold. See, Palazzo v. Gulf Oil Corp., 4 Energy Mgt. ¶ 26,448 (Em.App. 1983), cert. denied, ____ U.S. ____ (No. 83-6145, 52 U.S.L.W. 3631, Feb. 27, 1984); Arnson v. General Motors Corp., 377 F.Supp. 209 (N.D. Ohio 1974). When Congress created the Temporary Emergency Court of Appeals as "a court of special and limited jurisdiction"[40] which should "strictly construe [its] statutory grants

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[40] Texaco, Inc. v. D.O.E., 616 F.2d 1193, 1196 (Em.App. 1979), and authorities cited therein.

of jurisdiction,"[41] it did not authorize recovery of overcharges by indirect purchasers. The EPAA expired by its own terms in September 1981. We will not expand the statutes while exercising our jurisdiction under the savings clause. 15 U.S.C. § 760g.

Statute of Limitations

In addition to our foregoing holding that Plaintiff Fletcher does not have standing to sue Gulf, we hold that any claim by Fletcher would also be barred by the applicable statute of limitations.

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[41] United States v. Cooper, 482 F.2d 1393, 1398 (Em.App. 1973), approved by the Supreme Court in Bray v. United States, 423 U.S. 73, 96 S.Ct. 307, 309, 46 L.Ed.2d 215 (1975).

Because the ESA, EPAA and EPCA do not contain specific statutes of limitation, we must apply the most closely analogous state statute of limitation to causes of action arising under the Acts. Ashland Oil Co. of California v. Union Oil Co. of California, 367 F.2d 984 (Em.App. 1977), cert. denied, 435 U.S. 997 (1978); Colorado Petroleum Products Co. v. Husky Oil Co., 646 F.2d 555 (Em.App. 1981).

The district judge applied the Oregon six-year statute of limitations to Plaintiff Fletcher.[42] We hold that this was plain error and that the Washington two-year statute of limitations[43] should be applied to Fletcher.

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[42] Or. Rev. Stat. § 12.080 (1983).

[43] Wash. Rev. Code § 12.16.130 (1962).

Plaintiff Fletcher is a Washington resident.[44] Fletcher purchased 60 percent of its gasoline in Washington and 40 percent in Oregon.[45] All of Fletcher's gasoline was sold in Washington.[46] Gulf is a Pennsylvania corporation.[47] Under Oregon's "borrowing statute," Or. Rev. Stat. § 12.260, when two nonresidents bring a cause of action in an Oregon court which arose in another state, the Oregon court will apply the foreign state's statute of limitations if it is shorter than Oregon's.

The district judge held that although the "borrowing statute" might be applicable, his decision should also be governed by general Oregon choice of law

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[44] FFCL, Record at Volume 11, Tab 147, App. A, p. 2.

[45] Id.

[46] Id.

[47] Id.

standards.[48] Under Oregon law, when more than one state has an interest in a controversy, the law of the state which has the "most significant relationship" to the controversy will be applied.[49] The district judge found that Washington had no true interest in the controversy.[50] We disagree. Plaintiff Fletcher is a Washington resident. Most of the gasoline was purchased in Washington, and all of it was sold there. We hold that, as between Washington and Oregon, Washington had the more significant relationship to the controversy. Oregon's "borrowing statute" is applicable, and the shorter Washington two-year statute of limitations should apply to Fletcher.

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[48] Id. at 4.

[49] Id., citing Fisher v. Huck, 50 Or. App. 635, 624 P.2d 177 (1981).

[50] Id. at 6.

The district judge also declined to apply Washington's two-year statute of limitations because he found that "a two-year limitation places a bar on recovery inconsistent with federal policy."[51] We have already held that "[a] two-year statute is certainly not inconsistent with national energy policy seeking to wind up regulation of the oil industry -- 'temporary' _ab initio_." _Johnson Oil Co. v. DOE_, 690 F.2d 191, 196 (Em.App. 1982). _See also_, _Ashland Oil Co. v. Union Oil Co. of California_, _supra_; _Siegel Oil Co. v. Gulf Oil Corp._, 701 F.2d 149, 152 (Em.App. 1983).

Therefore, Washington's two-year statute of limitations should be applied to plaintiff Fletcher. Fletcher's claim was brought in 1977 for overcharges beginning in 1974. In a case such as this, where any

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[51] _Id._

overcharges incurred resulted from an initial improper base price, the statute of limitations begins to run from the date of the first overcharge. Western Mountain Oil, Inc. v. Gulf Oil Corp., 726 F.2d 765 (Em.App. 1983); Fleetwing Corp. v. Mobil Oil Corp., 726 F.2d 768 (Em.App. 1983); Lerner v. Atlantic Richfield Co., ____ F.2d ____ No. 9-78 (Em.App. March 13, 1984), rehearing en banc denied, April 10, 1984. Fletcher's claim for overcharges is barred by Wash. Rev. Code § 12.16.130.

Passing On Defense

Gulf claims that those overcharges which were passed through to the plaintiff's service station customers should not be refunded because the plaintiffs suffered no economic injury from overcharges which

were passed down the stream of commerce.[52] Although such use of a passing on defense has been denied because of difficulty of proof in the past,[53] Gulf argues that in determining the sum on which to award prejudgment interest, the trial court sufficiently found the amounts which the plaintiffs had passed through to their customers, and therefore, no difficulty of proof problem exists which would prevent the use of passing on as an affirmative defense.[54]

In Eastern Air Lines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (Em.App. 1979)

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[52]Gulf's Brief at 21.

[53]Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); Eastern Air Lines v. Atlantic Richfield Co., 609 F.2d 497 (Em.App. 1979) ("ARCO I").

[54]Gulf's Brief at 21-23.

("ARCO I"), this Court refused to allow a passing on defense in an overcharge action. In ARCO I, we held that, in order to be excepted from the general rule disallowing the affirmative pass on defense,[55] the defendant must establish that a preexisting functional equivalent of a cost-plus contract[56] existed in which plaintiffs would necessarily pass through any overcharge received, and that the effect of the overcharge to plaintiffs must be capable of determination in advance. Id. at 498.

Therefore, Gulf's assertion that the overcharges passed on by plaintiffs were determined by the magistrate at trial, thus obviating any difficulty of proof problem,

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[55] See, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed. 1231 (1968).

[56] Id.; In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979).

misses the point. In order for Gulf to successfully assert the passing on defense, the impact of any overcharges made by it to plaintiffs must be determinable before the overcharges occurred. Such was not the case here. There was no certainty about how plaintiffs would price their gasoline at the service station in response to the amount charged by Gulf. Because the exception to the general rule disallowing passing on as a defense is narrow, we hold that Gulf may not use the passing on defense in this case where no preexisting functional equivalent of a cost-plus contract existed.

Class of Purchaser Determination

Gulf asks us to overturn the district judge's order denying Gulf's motion to reopen the trial on the class of purchaser

issue.[57] Gulf sought to introduce additional evidence to show that the San Francisco Bay area, where Armour is located, is a distinct market from the Seattle-Tacoma-Portland area, where plaintiffs are located, and thus it would be inappropriate to use the same classification and base price for Armour and the plaintiffs.

Judge Panner denied the motion to reopen the trial during a telephone conference on May 12, 1982,[58] sixteen months before a final judgment was entered on September 12, 1983. It is apparent from the transcript of that conference that the judge had not fully considered the memorandum and affidavit accompanying

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[57] Gulf's Brief at 24.

[58] Record at Vol. 19, Tab 323.

Gulf's motion.[59] Although the grant or denial of a motion to reopen the trial is within the district judge's discretion,[60] we hold that the refusal to reopen the trial in this case was an abuse of discretion and clear error.

The district judge's ruling on the motion to reopen the trial without considering the supporting documents filed by Gulf was an abuse of discretion. See, Sertic v. Cayahoga Counties Carpenters Dist. Council, 459 F.2d 579 (6th Cir. 1972). The Pretrial Order in this case was extremely vague as to the issues framed for

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[59] Id. at 3.

[60] Sanders v. Int'l. Ass'n. of Bridge Workers, 546 F.2d 879 (10th Cir. 1976).

trial,[61] and we hold that Gulf did not have a full and fair opportunity to present evidence on its most similar existing class of purchaser after the ruling denying the use of Platt's Oilgram as a base price determinant. Therefore, we reverse and remand the district judge's ruling on the motion to reopen trial and direct him to consider Gulf's evidence and make a new determination of the proper class of purchaser and base price for the plaintiffs.

CONCLUSION

1. Gulf's Motion to Dismiss is DENIED.

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[61] Although the Pretrial Order contained references to the Armour class of purchaser, the record reflects that the idea of using the Armour base price for plaintiffs was first seriously considered at trial.

2. The district court's Order determining the proper class of purchaser for Plaintiffs is REVERSED and REMANDED with directions to reopen the trial to consider Gulf's evidence on the class of purchaser issue. Any award of overcharges must be recalculated to reflect any change in base price.

3. The Orders of the district court granting attorney's fees and prejudgment interest are REVERSED.

4. That portion of the judgment of the district court awarding overcharges to Plaintiff Fletcher is REVERSED.

The judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

CHRISTENSEN, Judge, concurring:

The prevailing opinion has my full concurrence but I wish to add a few words to clarify an unaddressed misconception relating to the wording of the controlling statute which might otherwise appear on its face to carry weight.

The contention has been made that if, as held in Eastern Airlines, a court's discretion to award attorney's fees under section 210(b) of the ESA is limited to cases of willful overcharges, mention of "costs" would not have been included in the phrase "reasonable attorney's fees and costs," since under the general rule taxable costs are recoverable by prevailing parties in any event. The contention fails to recognize the distinction between taxable costs awardable as of course to a prevailing party apart from adjudged liability and "reasonable attorney's fees

and costs" as a liability authorized in departure from the American Rule as to attorney's fees because of certain recognized equitable considerations or, as here, by express statutory provision under specified conditions. If the term "costs" in line with the argument had been eliminated from the phrase, a more plausible contention could have been made that even taxable costs could not be recovered at all in case of willful overcharges whereas they would have been if the overcharges were not willful. Congress did not need to invite the latter unreasonable construction by omitting the mention of costs in connection with its reference to attorney's fees. It plainly indicated its intention to the contrary and it would be quite unreasonable to hold that in so doing it granted carte blanche discretion to award "attorney's fees and costs" in disregard of the limitations it

specified merely because taxable costs otherwise may have been awardable to a prevailing party without reference to those limitations.

ZIRPOLI, Judge, concurring in part and dissenting in part:

While I am in accord with the opinion of the majority on the issues of jurisdiction, remand for further trial on the class of purchasers determination, and the statute of limitations applicable to Fletcher, I cannot agree with the majority's conclusions on the issues of prejudgment interest, attorney's fees, and Fletcher's standing. Accordingly, I must respectfully dissent.

A. Prejudgment Interest

The majority concludes that it was improper for the district court to award prejudgment interest in this case because the amount of overcharges by Gulf were not certain until after trial. The majority relies on Zahir v. Shell Oil Co., 718 F.2d 1567, 1573 (TECA 1983), and Eastern Air Lines, Inc. v. Atlantic Richfield Co., 712

F.2d 1402, 1410 (TECA), cert. denied, ____ U.S. ____, 104 S.Ct. 278 (1983). Neither of these cases bars an award of prejudgment interest in the present case. Because I find no abuse of discretion in the trial court's award of prejudgment interest in this case, I would affirm that portion of the decision.

"In the absence of an unequivocal prohibition of interest, and where the statute imposes a money obligation, the power of the court to award interest is dependent on an appraisal of the congressional purpose of imposing the obligation and on the relative equities of the parties." Hodgson v. American Can Co., 440 F.2d 916, 922 (8th Cir. 1971). The statute authorizing suits to collect overcharges is remedial in nature and designed to compensate those who have been overcharged for the losses that they sustained as a result of the overcharges.

See *Minnesota* *v.* *Standard* *Oil* *Co.*, 516 F.Supp. 682, 687 (D. Minn. 1981); *Ashland* *Oil* *Co.* *of* *California* *v.* *Union* *Oil* *Co.*, 567 F.2d 984, 990 n. 12 (TECA 1977). An award of prejudgment interest to compensate plaintiffs for the loss of the use of money is consistent with the congressional purpose of this statute.

The relative equities of the parties in this case do not tip so strongly towards Gulf as to render the award of prejudgment interest to plaintiffs an *abuse* *of* *discretion*. While it may be true that Gulf had financial difficulties in the Pacific Northwest where plaintiffs operate, this is not a proper factor to consider in deciding whether or not to award prejudgment interest, nor does it appear that the majority considers this to be a relevant consideration, since it is not mentioned in the opinion. What is a relevant factor, is that Gulf conceded its use of spot purchase

prices reported in Platt's Oilgram for establishing plaintiffs' base price was unjustified. In deciding to award prejudgment interest, the trial court expressed its "concern that there wasn't a more serious effort [by Gulf] . . . to correct the overcharge" (Tr. 1159). Although the trial court did find that Gulf's overcharges were not intentional, and so did not award treble damages, I think that it was well within its discretion to award prejudgment interest to plaintiffs on overcharges which they did not pass through to their customers.

The majority bases its reversal of the award of prejudgment interest on the fact that the principal amount of the overcharge was the "subject of a great amount of uncertainty" because the parties were in disagreement as to what was the most appropriate class of purchasers for plaintiffs. Until the trial court had

ruled on the appropriate class of purchasers question, the principal amount of overcharges could not be computed. Because this uncertainty as to a legal issue is not the type which is traditionally held to preclude an award of prejudgment interest, I would defer to the trial court's determination that the relative equities of the parties, as well as the remedial purpose of the statute, warranted the award. Neither Zahir or Eastern Airlines dictates otherwise.

In both Zahir and Eastern, this court affirmed the trial court's denial of prejudgment interest. In Zahir it was held that "the trial court did not abuse its discretion" in declining to award prejudgment interest where the plaintiff's claim was "not for a liquidated or readily liquidatable sum." 718 F.2d at 1573. In that case, the plaintiff's claim upon which he sought prejudgment interest was for lost

profits due to the defendant's failure to supply him with gasoline. A claim for lost profits is a highly speculative type of injury which must be estimated, rather than one which is capable of determination with mathematical precision. It has long been the rule that awards of prejudgment interest are not given on claims of injury which are not of the type capable of reasonably precise determination. Thus, the refusal of the trial court to award prejudgment interest in Zahir was clearly correct.

In the present case, on the other hand, the injury suffered by plaintiffs was one capable of mathematical computation. The "uncertainty" involved was due to the parties' dispute as to which was the proper class of purchasers for determining plaintiffs' base price. Once the trial court had made its ruling on the class of

purchasers question, the principal amount of the overcharge was one capable of mathematical computation.[1]

Courts have traditionally had discretion to award prejudgment interest in cases where the damages are liquidated or capable of mathematical computation. Thus, it has been said that "interest is allowed on all claims that are liquidated or readily ascertainable by mathematical computations . . . in other words where it is not necessary to rely upon opinion or discretion." Nelse Mortensen & Co. v.

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[1]A great deal of time was spent in determining what portion of the overcharges plaintiffs had passed through to their customers. The trial court had ruled that it would be inequitable to award plaintiffs prejudgment interest on overcharges that they had passed through, since to the extent of such pass-throughs, plaintiffs had not been deprived of the use of the money. Gulf should not be heard to complain about any "uncertainty" involved in determining the amount passed through, since this equitable determination to limit the award of prejudgment interest on overcharges was to Gulf's benefit.

United States, 305 F.Supp. 470, 471 (E.D. Wash. 1969) (quoting from Caterpillar Tractor v. Collins Machinery Co., 286 F.2d 446 (9th Cir. 1960)). A disputed claim is not rendered unliquidated or incapable of precise valuation merely because the parties disagree as to the proper method for calculating the principal amount due. Thus, in American Enka Co. v. Wicaco Mach. Corp., 686 F.2d 1050, 1057 (3rd Cir. 1982), where the parties were in disagreement over the correct date to be used for an award of the market value of goods lost by a bailee, the court held that the dispute concerned a liquidated amount "capable of ascertainment with mathematical precision" (once it was determined which was the proper date for purposes of valuing the property) and the trial court had discretion to award prejudgment interest. See also, Mortensen, 305 F.Supp. at 471 ("Mere difference of opinion as to amount is, however, no more a

reason to excuse him from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse." [Emphasis deleted; quoting from Prier v. Refrigeration Engineering Co., 442 P.2d 621, 627 (Wash. 1968).)

Nor does Eastern Airlines dictate any deviation from the traditional principle that the trial court has discretion to award prejudgment interest on sums which are liquidated or "capable of ascertainment with mathematical precision." American Enka, 686 F.2d at 1057. In Eastern, as noted above, the trial court did not award prejudgment interest, and this decision was affirmed. In the present case, on the other hand, the trial court, in its discretion, did award prejudgment interest. The majority, with no discussion of the relative equities of the parties or the remedial purpose of the statute, holds that

the trial court abused its discretion in awarding prejudgment interest in this case.

The majority apparently relies on the broad language in Eastern that "prejudgment interest is not available where the amount of damages claimed to be due is uncertain." 712 F.2d at 1410. However, as noted above, it is not every type of "uncertainty" which will preclude an award of prejudgment interest. An examination of the case cited in Eastern in support of the quoted language shows the relevant type of uncertainty to be that due to inherent difficulty in measuring the extent of injury, such as that involved in Zahir. The case cited in Eastern, Belcher v. Birmingham National Bank, 488 F.2d 474, 478 (5th Cir. 1973), was an action to recover the value of services rendered. In determining the reasonable value of services rendered, the court must rely upon "opinion or discretion" to estimate the

principal amount to be awarded. Mortensen, 305 F.Supp. at 471. Such an estimate necessarily means that the amount is not "readily ascertainable by mathematical computations." Id. Thus, the authority cited in Eastern does not support any broad rule that a dispute as to the legal issue of the most appropriate class of purchasers for plaintiffs will preclude an award of prejudgment interest. Furthermore, any such broad rule would be contrary to the remedial purposes of the statute. Thus, I do not read Eastern as holding that the trial court would have abused its discretion if it had awarded prejudgment interest in that case. Rather, as was made clear in Zahir, the trial court had discretion to deny prejudgment interest in Eastern, depending upon the equities, and there was no indication that it had abused its discretion in that case.

In the present case, the trial court considered the equities and the remedial purposes of the statute and concluded that an award of prejudgment interest was appropriate. I find no reason to overturn this decision.

B. Attorney's Fees

I must dissent from the majority's determination that it was "plain error" to award attorney's fees in this case. While I find the majority opinion somewhat ambiguous as to the basis for its holding on this question, I assume that the opinion is intended to hold that an award of attorney's fees is never authorized under section 210(b) of the Economic Stabilization Act if the defendant proves that the overcharge was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error." 12 U.S.C. § 1904

note. I do not think that a close examination of the statute supports this interpretation.

As a preliminary matter, it should be noted that although the trial court did expressly find that the overcharges in this case were not intentional, there was no express finding that they were the result of a "bona fide error notwithstanding the maintenance of [adequate procedures designed to prevent such errors]." The majority's statement that the "finding that Gulf maintained 'procedures reasonably adapted to the avoidance' of an overcharge" was not in the "precise language" of the statute (<u>see</u> opinion at 15) is somewhat misleading, since not only was such a finding not in the "precise language" of the statute, it was not made <u>at all</u>. Nevertheless, since I think it is clear that such a finding was impliedly made, I do not take issue with the majority's

conclusion that Gulf had proven that the overcharges were the result of a bona fide error. I make this observation only to make absolutely clear that this court was not under the erroneous impression that the trial court had made some express finding, even though not in the "precise language" of the statute. The basis for my conclusion that the trial court had made an implied finding that Gulf had made the overcharges in good faith notwithstanding the maintenance of adequate procedures is that the trial court went to the trouble of deciding a difficult statutory interpretation question as to whether attorney's fees were awardable even in cases where treble damages are not. Treble damages are clearly not awardable under section 210(b) where the defendant proves that the overcharge was unintentional and the result of a bona fide error notwithstanding the maintenance of adequate

procedures. If the trial court had not made an implied finding that Gulf's overcharges were the result of a good faith error, it would not have been necessary for it to decide the statutory interpretation question.

Unlike the majority, I agree with the district court's conclusion that section 210(b) authorizes an award of attorney's fees in this case even though Gulf had satisfied the court that its error was unintentional and the result of a good faith error. Section 210(b) provides, in pertinent part, as follows:

> [T]he court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
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> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
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> (2) not less than $100 or more than $1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted

> from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge. . . .

12 U.S.C. § 1904 note.

Upon close examination of the statute, the district court concluded that "the language of exception beginning with the word 'except' modifies only the language that follows the word 'plus.'" Thus, the court concluded that it had discretion to award attorney's fees in this case. I agree. Under the interpretation of this statute adopted by the majority, the award of costs, as well as attorney's fees, would not be authorized in cases where the defendant proves that the overcharge was unintentional. Such an interpretation clearly would run counter to the remedial purpose of the statute and to Congress' intent that private actions should play a "critical" role in the enforcement of the

price regulations. See Ashland Oil, 567 F.2d at 990 n.11. While the opinion in Eastern does include dicta which supports the majority's interpretation, the holding in that case was merely that the trial court had not erred in denying an award of attorney's fees and treble damages, and there is no indication that the court in that case was called upon to closely examine the statute.

Thus, I conclude that section 210(b) authorizes the court, in its discretion, to award "attorney's fees and costs" to a successful plaintiff in an action to recover overcharges even in cases where the defendant makes a showing that would preclude an award of treble damages. Since there is no indication that it would be an

abuse of discretion to award any amount of attorney's fees, I respectfully dissent.[2]

C. Fletcher's Standing

Although I concur in the majority's holding that the two-year Washington statute of limitations bars Fletcher's claims, and so do not believe it is necessary for the court to rule on the issue of Fletcher's standing, because the majority has expressed its views on this

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[2]Since I concur in the holding that this case should be remanded to permit Gulf to introduce new evidence on the class of purchasers issue, I express no opinion as to whether the amount of attorney's fees awarded in this case was reasonable. I would note, however, that plaintiffs are entitled to recover a "reasonable fee" based upon the "prevailing market rates" in the community, and are not restricted to recovery of the fees actually billed. Blum v. Stenson, ____ U.S. ____, 52 U.S.L.W. 4377, 4379 (March 21, 1984). It appears that a substantial portion of the "bonus" referred to by the majority (see opinion note 38) may be attributable to the fact that the fees actually billed plaintiffs were lower than the market rate.

issue, I feel constrained to state my views.

Fletcher was a retail seller of gasoline under the Gulf brand in Washington and Oregon until Gulf withdrew its brand from the region in 1974. Gulf continued to supply gasoline to Fletcher and the other plaintiffs after 1974, on an unbranded basis, as required by the mandatory allocation regulations. The gasoline sold by Fletcher under the Gulf brand was purchased under a cost-plus contract between Fletcher and Tesoro Petroleum Corporation. Tesoro, in turn, had a gasoline supply contract with Gulf. Thus, on a superficial basis, it might appear that Fletcher was not a direct purchaser from Gulf; however, an examination of all the facts supports the district court's finding that "the sale [by Gulf] in substance was to Fletcher." Fletcher had substantial direct dealings with Gulf.

Fletcher took delivery of the gasoline directly from Gulf. Gulf established a procedure by which Fletcher transmitted its credit card slips directly to Gulf, which in turn would credit Tesoro's account. Gulf included Fletcher in meetings held with all of Gulf's branded jobbers, and notices of price changes came directly from Gulf to Fletcher, not through Tesoro. Prior to the execution of both the Gulf-Tesoro and the Tesoro-Fletcher contracts, Gulf was informed that Fletcher would be the party receiving and retailing the gasoline, and Gulf representatives investigated Fletcher's station locations, and explained the ramifications of Fletcher's anticipated use of the Gulf brand. The contract between Tesoro and Fletcher provided that Fletcher would pay Gulf's price plus a fixed markup of $.00375 per gallon. When Gulf applied to the DOE to withdraw as a supplier from certain West

Coast locations, Gulf referred to its supply obligation to "Tesoro Fletcher."

Section 210(b) of the ESA authorizes suits for overcharges ". . . against any person . . . who is found to have overcharged the plaintiff." This statute has been interpreted as limiting standing in overcharge suits to "direct purchasers." Thus, in Arnson v. General Motors Corp., 377 F.Supp. 209, 211-12 (N.D. Ohio, 1974), the court held that a purchaser of an automobile from a dealer did not have standing to sue the manufacturer for alleged overcharges by the manufacturer to the dealer. In reaching this conclusion, however, the court noted "there is no allegation that [the defendant] dealt directly with the plaintiff in any manner. Thus absent any privity between plaintiff and defendant, it is apparent that defendant is not a seller within the scope of the Act as it relates to this

transaction." 377 F.Supp. at 212. Furthermore, the court in Arnson specifically found that there was no agency relationship between the manufacturer and the dealer by which price increases of the manufacturer were automatically passed on to the ultimate consumer. In fact, such price increases were not passed on by the dealer in five percent of the cases. Id. at 214. In the present case, on the other hand, there were substantially direct dealings between Gulf and Fletcher, and the price paid by Fletcher was directly tied to the price charged by Gulf through a cost-plus contract. Thus, Arnson, relied on by the majority, by no means establishes that Fletcher lacks standing to sue Gulf for overcharges.

Nor does Palazzo v. Gulf Oil Corp., the other case cited by the majority, stand for the proposition that an "indirect" purchaser such as Fletcher had no standing

to sue. In Palazzo, the plaintiff was an officer and stockholder of the entity which made the purchases from the defendant. Thus, the overcharges by Gulf had no direct and mathematically certain impact on Palazzo. Overcharges by Gulf in the present case, on the other hand, had a direct and ascertainable impact on Fletcher, due to the cost-plus contract between Tesoro and Fletcher.

It is the general rule under the antitrust laws that an indirect purchaser has no standing to sue, yet there is an exception to this rule which permits such suits where the plaintiff makes purchases under a cost-plus contract. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1976); In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163-64 (5th Cir. 1979). I see no reason why such an exception should not also exist for suits to recover overcharges under

section 210(b). This is especially true in view of Congress' intent that private suits to recover overcharges would serve both remedial and policing functions. To hold that Tesoro, not Fletcher, is the only party which would have standing to sue for these overcharges would not serve any remedial purpose, since Tesoro was not harmed by Gulf's overcharges. Tesoro received its $.00375 per gallon no matter what Gulf charged. Nor would such a holding advance the enforcement purposes of the statute, since Gulf would be permitted to raise the defense that Tesoro passed on all of Gulf's overcharges to Fletcher. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968); Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (TECA 1979); and majority opinion at 19. Tesoro obviously would have no motivation to bring suit for overcharges

by Gulf for which it could not recover due to the passing-on defense.

D. Remand

In joining the majority ruling that the case be remanded to reopen the trial to consider Gulf's evidence on the class of purchasers issue, I am satisfied that the court expresses no view on what the proper class of purchasers will ultimately be found to be. I do not understand the majority's statement that the district court's findings were "erroneous as to the class of purchaser base price" (opinion at 12) to be a determination as to the proper class of purchaser.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. 9-80 and 9-81

GULF OIL CORPORATION,

Defendant-Appellant/Cross-Appellee,

v.

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher
Oil Company,

Plaintiffs-Appellees/Cross-Appellants,

and

UNITED STATES OF AMERICA, Intervenor.

Before CHRISTENSEN, ESTES and ZIRPOLI, Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Oregon and was argued by counsel. In consideration whereof, It is

ORDERED that (1) Gulf's Motion to Dismiss is Denied; (2) the district court's

Order determining the proper class of purchase for Plaintiffs is REVERSED and REMANDED with directions to reopen the trial to consider Gulf's evidence on the class of purchaser issue. Any award of overcharges must be recalculated to reflect any change in base price; (3) the Orders of the district court granting attorney's fees and prejudgment interest are REVERSED; and (4) that portion of the judgment of the district court awarding overcharges to Plaintiff Fletcher is REVERSED. And it is,

FURTHER ORDERED that the judgment of the district court is REVERSED and REMANDED for further proceedings consistent with this opinion.

FOR THE COURT:

Donna M. Bold, Clerk

by: /s/ Patricia L. Krosel
Patricia L. Krosel
Chief Deputy Clerk

April 17, 1984

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. 9-80 and 9-81

GULF OIL CORPORATION,

Defendant-Appellant/Cross-Appellee,

v.

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher
Oil Company,

Plaintiffs-Appellees/Cross-Appellants,

and

UNITED STATES OF AMERICA, Intervenor.

Before CHRISTENSEN, ESTES and ZIRPOLI, Judges.

O R D E R

Upon consideration of the Petition for Rehearing filed by Appellant/Cross-Appellee, Gulf Oil Corporation, it is

ORDERED that said petition is DENIED. The mandate shall issue on June 5, 1984, as set forth in the Order of this Court dated May 29, 1984.

FOR THE COURT:

Donna M. Bold
Clerk

by: /s/ Patricia Krosel
Patricia Krosel
Chief Deputy Clerk

June 4, 1984

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Nos. 9-80 and 9-81

GULF OIL CORPORATION,

Defendant-Appellant/Cross-Appellee,

v.

RICHARD W. DYKE, dba Western Stations Co.,
COLVIN OIL COMPANY, and
F. O. FLETCHER, INC., dba Fletcher
Oil Company,

Plaintiffs-Appellees/Cross-Appellants,

and

UNITED STATES OF AMERICA, Intervenor.

Before CHRISTENSEN, ESTES and ZIRPOLI, Judges.

O R D E R

Upon consideration of Plaintiffs-Appellees/Cross-Appellants' Petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that the petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing _en banc_ is DENIED. The mandate shall issue on June 5, 1984.

FOR THE COURT:

Donna M. Bold
Clerk

May 29, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RICHARD W. DYKE, dba Western Stations Co.,	)	Civil No. 77-10-PA
Plaintiff,	)	
v.	)	
GULF OIL CORPORATION, a Pennsylvania corporation	)	
Defendant.	)	
COLVIN OIL COMPANY, an Oregon corporation,	)	Civil No. 77-791-PA
Plaintiff,	)	
v.	)	
GULF OIL CORPORATION, a Pennsylvania corporation,	)	
Defendant.	)	

F.O. FLETCHER, INC., dba FLETCHER OIL COMPANY,	)	Civil No. 77-849-PA
Plaintiff,	)	
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
GULF OIL CORPORATION, a Pennsylvania corporation,	)	
Defendant.	)	

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PANNER, J.

These are actions under the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 et seq., to recover overcharges in the price of gasoline. The parties agreed that the three cases would be consolidated for trial. They further agreed that Dyke would be tried first and that the court's findings and conclusions in that case would also apply to Colvin and Fletcher.

This court has subject matter jurisdiction pursuant to sections 210 and 211(a) of the Economic Stabilization Act of 1970 ("ESA"), 84 Stat. 799, as amended, as so incorporated by reference into section 5(a)(1) of the EPPA. See 12 U.S.C.A. § 1904, Note (1979 Pocket Part). This court has pendent subject matter jurisdiction over Gulf's counterclaim

against Dyke arising out of the same nucleus of operative facts as Dyke's claim.

Herewith follow findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

I. FINDINGS OF FACT

A. Description of Parties.

1. Dyke, Colvin and Fletcher are unbranded independent marketers of motor gasoline and are reseller-retailers as defined in the EPAA. 10 C.F.R. § 212.31.

2. Gulf is a refiner as defined in the EPAA. 10 C.F.R. § 212.31.

3. (a) Dyke marketed gasoline in western Oregon and Longview, Washington beginning in 1971. He received Gulf product from 1971 to January 1977 via terminals located in Portland and Eugene, Oregon and Crescent City, California. From 1975 to January 1977 he marketed gasoline

in the Seattle-Tacoma, Washington area, receiving Gulf product at the Tacoma, Washington terminal.

(b) Colvin markets gasoline in southwest Oregon. It received Gulf product via terminals located at Crescent City, California and Eugene, Oregon from 1967 until January 1977.

(c) Fletcher markets gasoline in Washington and Oregon. It received Gulf product via terminals located at Tacoma, Washington and Portland, Oregon from 1970 until January 1977.

4. (a) In 1972 Dyke, Colvin and Fletcher purchased Gulf branded gasoline on contract and sold that gasoline under Gulf's brand name.

(b) Product was delivered by Gulf to Dyke's stations or Dyke received a hauling allowance for transporting the gasoline from the terminals to Dyke's

stations. Colvin and Fletcher received hauling allowances.

(c) Dyke as a branded jobber had the right to honor Gulf credit cards, obtain free painting of service station facilities, and received reimbursement for expenses paid by Gulf in lieu of other delivery expenses. Each of those above-mentioned benefits enjoyed by Dyke while operating as a Gulf-branded jobber and service station operator have historically been provided by Gulf solely in conjunction with the use of its brand.

B. Divestiture Area.

1. (a) In October 1972 Gulf adopted a divestiture program for the northwestern United States. Under this program Gulf disposed of approximately 2.5 percent of its assets including approximately 3,500 service stations and 275 bulk plants and terminals. Also encompassed in the divestiture plan was the termination of

Gulf's branded gasoline relationships. Gulf intended to withdraw from its marketing operations in northern California, northern Nevada, Oregon and Washington. This area has been described as Gulf's San Francisco Retail Marketing District.

(b) Gulf's branded operations throughout the divestiture area had produced consistent and substantial losses. Prior to the divestiture decision, Gulf incurred losses in those marketing areas of $31.7 million in 1971 and $37 million in 1972. Gulf's management decision to divest was made before the adoption of the EPAA.

(c) Part of Gulf's divestiture program implemented in the Pacific Northwest was the withdrawal of the Gulf brand.

(d) Following the divestiture decision, Gulf was required by mandatory allocation regulations to continue to make

gasoline available to its jobbers in the area that it supplied during 1972. 10 C.F.R. § 211.

(e) Effective January 1, 1974 Gulf continued to supply gasoline but withdrew its brand from purchasers in the San Francisco Retail Marketing District.

2. Within this area Gulf had terminals at:

Tacoma, Washington
Portland, Oregon
Eugene, Oregon
Crescent City, California
Bradshaw (Sacramento), California
Hercules (San Francisco), California
Brisbane, California
San Jose, California
Stockton, California
Fresno, California
Reno, Nevada

3. All but one of Gulf's jobbers in this area were branded jobbers on May 15, 1973.

4. The only unbranded jobber in this area as of May 15, 1973 was Armour Oil Co., which picked up product at several terminals in northern California.

C. May 15, 1973 Branded Jobbers.

1. Gulf sold branded gasoline to Dyke on May 15, 1973 from the following terminals at the following prices:

Terminal	Destination	Good Gulf (Regular)	No Nox (Premium)
Portland	Portland	.1495	.1820
Eugene	Cottage Grove	.1495	.1820
Crescent City/ Eugene	Roseburg	.1595	.1920
Crescent City/ Eugene	Elsewhere	.1695	.2020

2. Gulf sold branded gasoline to Tesoro/Fletcher[1] in Tacoma, Washington on May 15, 1973 at the following prices:

	Good Gulf (Regular)	No Nox (Premium)
Tacoma	.1445	.1770

3. Gulf sold branded gasoline to these northern California jobbers on May 15, 1973 at the following prices:

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[1] The relationship between Gulf, Tesoro Petroleum Corporation ("Tesoro") and Fletcher is discussed *infra*.

Jobber	Good Gulf (Regular)	No Nox (Premium)
Caldo Oil Co.	.1495	.1820
Curtesy Oil, Inc.	.1495	.1820
Major Oil Co.	.1495	.1820
Miles Oil Co.	.1495	.1820
Olympian Oil	.1495	.1820
Ramco Oil Co.	.1495	.1820
Red Triangle Oil Co.	.1495	.1820
Rinehart	.1595	.1920
Sierra Petroleum	.1695	.2020
Sturdy Oil Co.	.1495	.1820
Tom's Sierra Oil Co.	.1495	.1820

4. The prices extended to branded jobbers on May 15, 1973 included certain price-related amenities such as the use of Gulf's credit cards, brand name and advertising. The branded jobbers also received hauling allowances. When these branded jobbers were converted to unbranded status, the hauling allowances and amenities were eliminated.

5. Dyke purchased gasoline from Gulf under a ten-year written contract obliging him to make minimum purchases and providing for credit terms net within 10 to 25 days.

6. Armour purchased gasoline on a spot basis with no written contract and with credit terms net within 30 to 60 days.

7. Location. In pricing its products on May 15, 1973 Gulf did not treat its Northwest purchasers significantly different from its northern California purchasers, as indicated in Dyke's Exhibit 69, summarized below:

Company	Location PAD Dist.	Location Mkt. Dist.	Type 5/15/73	Vol. (Mon.)	Terms & Cond.	Branded Regular 5/15/73 Price (Ex. HA)	Type Jan. 1974	Unbranded 5/15/73 Price
DYKE	V	SFMD*	B*	1-2.5 Million	Net Price	.1495	U*	.1730 (Platt's)
OLYMPIAN	V	SFMD	B	1-2 Million	Net Price	.1495	U	.1320 (Armour)
RAMCO	V	SFMD	B	Below 1 Million	Net Price	.1495	U	.1370 (Armour)
MILES	V	SFMD	B	Below 1 Million	Net Price	.1495	U	.1370 (Armour)
CURTESY	V	SFMD	B	Below 1 Million	Unknown	.1495	U	.1370 (Armour)
STURDY	V	SFMD	B	Below 1 Million	Net Price	.1495	U	.1320 (Armour)
ARMOUR	V	SFMD	U	2-7 Million	Unknown	N/A	U	.1320

*SFMD = San Francisco Retail Marketing District
* HA = Hauling Allowance
* B = Branded
* U = Unbranded

8. Type of Purchaser. The type of purchaser, branded versus unbranded, is exactly the same for all the branded jobbers who were placed in the unbranded categories.

9. Volume. The volume, while larger in the case of Armour, is not significantly different. There is no showing of price differential made by Gulf based on volume differences between branded jobbers. Olympian and the other northern California Gulf branded jobbers who became unbranded were placed in the same classes of purchaser as Armour even though they had substantially less volume than Armour.

10. Terms and Conditions. The terms and conditions extended to the northern California purchasers were just the same as extended to Dyke, with the possible exception of two that were unknown. Gulf did not offer any indication that they were different.

D. January 1, 1974.

1. The May 15, 1973 prices Gulf utilized to compute unbranded prices to California jobbers in the divestiture area after December 31, 1973 were unbranded prices at which Gulf had sold unbranded gasoline to Armour on May 15, 1973.

2. Gulf applied the following May 15, 1973 Armour prices at the Hercules, San Jose, and Bradshaw (Sacramento) terminals for the formulation of unbranded prices to the California jobbers picking up at those terminals after December 31, 1973:

Terminal	Regular	Premium
Hercules	.1320	.1495
San Jose	.1355	.1530
Bradshaw	.1370	.1545

3. Gulf utilized the following May 15, 1973 prices for the formulation of unbranded gasoline prices to Dyke after December 31, 1973:

Terminal	Regular	Premium
Tacoma	.1720	.1895
Portland	.1730	.1915
Eugene	.1730	.1915
Crescent City	.1730	.1915

4. (a) Gulf used Platt's Oilgram to determine the May 15, 1973 unbranded prices for the former Gulf branded jobbers at the Tacoma, Washington; Portland, Oregon; Eugene, Oregon; and Crescent City, California terminals.

(b) The edition of Platt's Oilgram utilized by Gulf to determine unbranded jobber May 15, 1973 gasoline selling prices was dated May 15, 1973, vol. 51, No. 94, page 5-A. The following were reported as the West Coast Terminal prices:

	Los Angeles/ San Francisco	Seattle/ Tacoma	Portland
100 Oct Prem.	15.6-18.95	18.95	19.15
95 Oct Prem.	14.5-17.85	17.30	17.50
91 Oct Prem.	13.4-16.75	16.75	16.95

(c) The gasoline prices in Platt's for Seattle/Tacoma and Portland

were based on spot purchases by a small refiner, Powerine.

(d) In order to determine a price for its 93 octane (regular) gasoline from Platt's 91 octane price, Gulf used the difference between Gulf's prices to Armour for 91 and for 93 octane and added that differential to the Platt's 91 octane price.

(e) Mr. Gilchrist of Gulf talked to general counsel and spoke with others within Gulf about the use of trade journals to establish prices.

5. (a) Gulf originally relied on the new item - new market rule, 10 C.F.R. § 212.111, as the basis for its use of Platt's Oilgram to determine May 15, 1973 unbranded prices to Dyke. Gulf later conceded that the rule was inapplicable.

(b) On and after January 1, 1974 Duke continued to receive product from Gulf

at the same terminals and to market it at the same locations as before.

(c) There was no difference between the quality of gasoline which was sold by Gulf to Dyke prior to January 1, 1974 and that sold after.

E. Submission of Claims.

1. Dyke was first aware of Gulf's overcharges when he was contacted by a DOE auditor investigating Gulf's prices.

2. Dyke claims that Gulf overcharged him in a series of gasoline sales from January 1, 1974 through January 31, 1977 in violation of the EPAA and its price regulations.

3. Dyke submitted a 90-day demand letter to Gulf. Gulf did not respond to the letter.

4. Dyke's complaint was filed January 4, 1977.[2] Colvin's complaint was filed October 11, 1977. Fletcher's complaint was filed October 20, 1977.

5. Gulf counterclaims against Dyke for his failure to pay Gulf $735,444.78 for gasoline purchases from December 16, 1976 through January 28, 1977.

F. Fletcher's Standing.

1. In late September or early October 1970, Tesoro entered into a gasoline supply contract with Gulf. Tesoro and Fletcher thereupon entered into an agreement whereby Fletcher received the gasoline Tesoro purchased from Gulf.

2. Fletcher and Tesoro agreed prior to execution of any of these agreements that Fletcher's gasoline requirements would

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[2] This case was originally assigned to Chief Judge Skopil who was appointed to the Ninth Circuit in 1979. There was also an interlocutory appeal by the DOE. Dyke v. Gulf Oil Corp., 601 F.2d 557 (TECA 1979). On remand, Chief Judge Burns granted a six-month stay of proceedings and assigned the case to me. I lifted the stay in July 1980. The trial was conducted in stages from November 1981 to April 1982. I assigned Magistrate Juba to determine the amount of prejudgment interest to be awarded and adopted his findings and recommendations on October 26, 1982.

be supplied by Gulf through a separate contract between Tesoro and Gulf. Accordingly, Gulf agreed to contract with Tesoro for the sale of branded gasoline on a wholesale basis in the states of Washington, Oregon and Idaho. It was understood that the prices for those sales would be at a level low enough to permit Tesoro a small margin on resales at prices competitive for its customers. When Fletcher entered into its agreement with Tesoro, it was aware of and relied on Gulf's agreement to supply.

3. Prior to execution of the contract between Tesoro and Gulf, Tesoro explained that the product to be supplied by Gulf under the contract was to go to Fletcher, and Gulf agreed to that arrangement.

4. Gulf's representatives investigated Fletcher's station locations before executing the contract with Tesoro.

Gulf's representatives explained to Fletcher's representatives and sales employees the ramifications of Fletcher's change to the Gulf brand, including price supports, hauling allowance, use of Gulf credit cards, Gulf signs and Gulf station painting.

5. Fletcher did not approach Gulf directly as a supplier. One of Fletcher's goals was to obtain a long-term, fixed rent lessor for all of Fletcher's service station properties. Following Gulf's acknowledgement of the agreement to supply branded product to be delivered to Fletcher service stations, Tesoro offered to lease all the stations, pay a guaranteed rental sum and extend the lease through eight years. Fletcher was permitted to lease back the properties on a year-to-year basis, providing Fletcher with maximum flexibility and security. Since Tesoro had

the long-term lease, it was left to Tesoro to locate a suitable supplier.

6. While there was a contract between Gulf and Tesoro and a contract between Tesoro and Fletcher, the sale in substance was to Fletcher. Gulf knew that before entering into the contracts. A term of the sublease was a gasoline sales agreement between Tesoro and Fletcher. Under this sales agreement, Tesoro was obligated to supply Fletcher's requirements for gasoline through the subleased premises.

7. For all grades of gasoline supplied under Fletcher's sales agreement with Tesoro, Fletcher paid Gulf's price plus a fixed markup of $.00375/gal.

8. Tesoro was invoiced by Gulf and made payment to Gulf.

9. As part of the transaction, Gulf established a special procedure for Fletcher to transmit its Gulf credit card

sales invoices directly to Gulf, for which Gulf allowed Tesoro credit on Tesoro's open account. Fletcher was informed that this special procedure was set up "[d]ue to the unique relationship between Fletcher Oil Company, Tesoro and Gulf."

10. A notice dated June 9, 1971 from E.R. Eisemann, Jr., Vice President of Gulf, addressed and sent directly to Fletcher to notify it of product substitution, refers to "the contract(s) currently in effect between us concerning the sale of Gulf gasolines."

11. At all times material to this case Gulf authorized Fletcher to take delivery of product directly from terminals in Oregon and Washington designated by Gulf.

12. Gulf granted Fletcher "jobber assistance" upon proper request from Fletcher.

13. Gulf included Fletcher in meetings held for Gulf Western Region Jobbers, which Mr. Hirschburg, president of Fletcher, attended.

14. Notices of price changes came directly from Gulf to Fletcher, not from Tesoro.

15. In 1975, when Gulf applied to the DOE[3] to withdraw as a supplier from certain West Coast locations, Fletcher received a copy of Gulf's application in which Gulf's Legal Department requested the DOE to terminate its supply obligation to "Tesoro Fletcher."

16. The unique relationship between Fletcher, Tesoro and Gulf continued throughout all relevant times in this case.

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[3] References to the Department of Energy ("DOE") include references, in appropriate time periods, to the predecessor agencies: Federal Energy Administration, Federal Energy Office, and the Cost of Living Council.

G. <u>Statute of Limitations</u>.

During the course of the trial, I decided which statutes of limitations would apply to the various transactions. My opinion is attached as Appendix A.

II. <u>CONCLUSIONS OF LAW</u>

A. <u>Maximum Allowable Selling Prices</u>.

1. Gulf was not allowed to charge prices for its covered products in excess of a maximum allowable price. Maximum allowable price means the weighted average price at which the covered product was priced for sale on May 15, 1973 plus any allowable increased product costs and increased non-product costs incurred after that date. 10 C.F.R. § 212.82.

2. To arrive at a maximum allowable price, Gulf was required to establish appropriate classes of purchasers. Class of purchaser under the regulations means

purchasers to whom a person has charged a comparable price for comparable product or service pursuant to customary price differentials between those purchasers and other purchasers. 10 C.F.R. § 212.31.

3. Customary price differentials include price distinctions based on discount allowances, add-on, premium, and an extra based on a difference in volume, grade, quality or location or type of purchaser or a term or condition of sale or delivery. Id.

4. In ruling 1975-2, 3 Energy Mgt. (CCH) ¶ 16,042, the DOE explained the application of the class of purchaser concept. In doing so it defined the term "customary price differential" and pointed to illustrative factors which may account for price distinctions. These important factors, aside from grade and quality, are (a) location, (b) type of purchaser,

(c) volume and (d) term or condition of sale or delivery.

B. Class of Purchaser.

1. The change from a branded to unbranded relationship between the supplier and the purchaser calls for a change in the purchaser's classification. Administrative decisions support this conclusion. Greenbelt Consumer Services, Inc., 1 FEA ¶ 20,211 (Dec. 17, 1974); State of New Hampshire, 2 FEA ¶ 80,574 (Apr. 16, 1975).

2. The parties do not dispute Gulf's legal right to change Dyke from a branded to unbranded status. Gulf's withdrawal of various services including hauling allowances, service station painting allowances, and credit card programs in conjunction with withdrawal of its brand did not violate former 10 C.F.R. § 210.62.

3. Gulf was obligated to place Dyke in Gulf's most similar existing class of

purchaser.[4] _Saber_ _Petroleum_ _Corp._, 5 FEA ¶ 80,544 (Feb. 4, 1977). _See_ _also_ _Atlantic_ _Richfield_ _Co._, 4 FEA ¶ 80,550 (Oct.8, 1976); _Mid_ _Continent_, _Inc._, 3 FEA ¶ 80,507 (Nov. 14, 1975); _Western_ _Jobbers_ _Alliance_, 4 FEA ¶ 87,010 (Sept. 10, 1976).

4. Gulf did not have the right to rely on the new item - new market rule. Although Gulf initially raised this possibility, Gulf conceded that it did not have the right to rely on this rule. By

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[4]This is consistent with a primary purpose of the regulations, and the law establishing the regulations, which is to maintain the price differentials that existed on May 15, 1973 between groups of purchasers. This goal cannot be reached if suppliers such as Gulf are allowed to create new classes of purchasers and set new prices when business relationships change.

selecting a price based on reported sales in _Platt's_ _Oilgram_, Gulf improperly created a new class of purchaser for Dyke.

C. Selection of Existing Class of Purchaser.

1. (a) Dyke should have been placed in the Armour classes of purchaser.

(b) Armour consisted of several classes of purchaser, one for each terminal where it picked up product.

(c) Dyke is assigned to three pricing zones emanating out from the Seattle-Tacoma refinery complex, reflecting the three stipulated Armour prices emanating out from the San Francisco complex. The terminals farthest from the Seattle/Taxoma refinery complexes receive the Armour prices at the terminal farthest from the San Francisco area refinery and the terminals closest to the Seattle refinery receive the Armour prices at the San Francisco refinery. The assignment of May 15, 1973 Armour prices to the

terminals where Dyke lifted product is summarized in the following table:

Regular	Zone	Price
Tacoma	1	.1320
Portland	2	.1355
Eugene	3	.1370
Crescent City	3	.1370
Premium		
Tacoma	1	.1495
Portland	2	.1530
Eugene	3	.1545
Crescent City	3	.1545

2. Gulf's other existing classes of purchaser in the divestiture area on May 15, 1973 were its branded classes. Under the circumstances of this case, the branded classes were inappropriate for Dyke without a price adjustment for loss of branded benefits. Under the regulations, however, it is not proper to apply such price adjustments to an existing class of purchaser. For this additional reason, Dyke should have been placed in the existing Armour unbranded classes of purchaser.

D. Overcharge Calculation Methodologies.

1. The proper method in this case for calculating the overcharges is to subtract the court-ordered May 15, 1973 prices to Dyke from the May 15, 1973 prices imputed to Dyke based on Platt's Oilgram. If Gulf did not actually pass through its full cost increment to Dyke in a month, the cost increment difference is to be subtracted from the overcharge calculated on May 15 prices. The difference shall be multiplied by the volume of each grade of gasoline sold to Dyke in each month. This method is appropriate under the regulations and is the most fair to the parties.[5]

2. Gulf advocates use of the refiner price formula to calculate overcharges in this case.[6] The parties' various refiner price rule calculations, described as "Refiner's Price formula - Ex. #95B"; "Deemed Recovery After 9/1/74"; "Leener's

Equal Application - Ex. #137" ("equal

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[5]This calculation follows the same format used by the DOE in its proposed remedial order to Gulf dated December 21, 1981. But, in addition, it gives Gulf credit for the difference between the cost pass-through increment Gulf charged to other customers and the increment it charged to Dyke. These cost pass through increments were also used by Gulf to add to May 15, 1973 prices to calculate maximum allowable prices in Gulf's original answers to plaintiffs' interrogatories.

[6]Gulf contends that Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA), cert. denied, 434 U.S. 836 (1977), requires use of the refiner price formula to calculate overcharges resulting from May 15, 1973 base price error. The refiner price formulas presented by the parties to compute overcharges in this case are not required by Longview.

application/deemed recovery approach"); and as "Leener's Unit Proportional Bank - Ex. #136" ("proportional bank approach") in Dyke's Exhibit 113 are inappropriate.

3. Under Dyke's equal application/ deemed recovery approach, Gulf's bank of unrecouped costs would be destroyed. It would be totally inequitable to destroy Gulf's bank by utilizing that formula.

4. Gulf's proportional bank approach is not fair or equitable. That formula would permit Gulf to apply additional costs to Dyke that were not charged to any other purchaser. Gulf argues, in effect, that if it makes an error, it should be allowed to assess additional costs that it did not elect to assess to anyone else. It would permit Gulf to benefit by its own error without any charge against its bank other than the charge for this particular purchaser. Under the circumstances of this case, this approach is inappropriate.

5. The parties stipulated to the gallons, prices and other factors in the court's methodology to arrive at the overcharge figures: $2,000,000 for Dyke, $745,000 for Colvin and $790,000 for Fletcher.

E. Affirmative Defenses.

1. Gulf's affirmative defense that any Gulf overcharges should be reduced to the extent Dyke was able to pass on the overcharges in his own prices is denied. This ruling is based on difficulty of proof and the lack of a pre-existing cost-plus contract or its functional equivalent. Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977); Eastern Airlines v. Arco, 609 F.2d 497 (TECA 1979); Go-Tane Service Stations, Inc. v. Ashland Oil, Inc., 508 F. Supp. 200 (N.D. Ill. 1981).

2. Gulf's affirmative defense of laches is denied. The parties brought their claims against Gulf within a reasonable time.

3. Gulf's affirmative defenses of estoppel and alleged failure to report the overcharges to the DOE are denied. Dyke purchased from Gulf because it was Dyke's

base period supplier under the regulations. Dyke first became aware of the overcharges when contacted by a DOE auditor investigating Gulf's prices.

F. Treble Damages.

1. The 90-day notices sent by the plaintiffs were sufficient, within the meaning of the statute.

2. When a 90-day notice has been sent and overcharges have been determined, the burden is on the defendant to prove the overcharges were not intentional and that reasonable priactices were established to prevent overcharges. If that burden is met, defendant avoids imposition of treble damages.

3. Treble damages will not be awarded in this case. In light of the circumstances and lack of guidelines at the time Gulf's decision was made, I find that the overcharges were not intentional.

G. Statute of Limitations.

The court's opinion of March 8, 1982 contains the conclusions on this issue. *See* Appendix A.

H. Prejudgment Interest.

1. Dyke is entitled to prejudgment interest to the extent he is able to prove that he lost the use of money attributable to Gulf's overcharge.

2. The rate of interest as established by the DOE is the appropriate rate. This is a federal case involving federal regulations and statutes. In addition, the DOE rate would more nearly recompense Dyke for his loss than the Oregon statutory rate of interest over this period.

3. Calculation of prejudgment interest was assigned to Magistrate Juba. His "FINDINGS AND RECOMMENDATION" was adopted by the court and contains its

findings and conclusions on this issue. <u>See</u> Appendices B and C.

4. (a) Based on the court's prejudgment interest rulings, the parties stipulated to the following interest as of December 1982 for each plaintiff:

Richard W. Dyke	$499,199.34
Fletcher Oil Company	350,900.68
Colvin Oil Company	175,276.28

(b) The parties also stipulated to the amounts on which interest is to be determined beginning January 1, 1983:

Richard W. Dyke	$705,788.29
Fletcher Oil Company	695,900.68
Colvin Oil Company	305,730.58

I. <u>Fletcher Standing</u>.

Based on the relationship between Gulf and Fletcher as reflected in the Findings of Fact, the court concludes that Fletcher has standing to sue under section 210(b) of the Economic Stabilization Act as incorporated into the EPAA. The court rejects Gulf's argument that Fletcher was an indirect purchaser and thus has no

standing to sue. Illinois Brick, 431 U.S. 720 (1977), does not compel a contrary result.

CONCLUSION

Separate judgments will be entered for each plaintiff.

Dyke will be awarded $1,364,555.22 for overcharges (the setoff of $2,000,000.00 minus $735,444.78)[7] plus appropriate prejudgment interest and attorneys' fees.

[7]Dyke does not contest Gulf's counterclaim for breach of the Gulf-Dyke gasoline sales contract. Gulf is therefore entitled to recover from Dyke the sum of $735,444.78 which amount is to be offset against overcharges which Dyke would otherwise recover from Gulf.

Colvin will be awarded $745,000.00 for overcharges plus prejudgment interest and attorneys' fees.

Fletcher will be awarded $790,000.00 for overcharges plus prejudgment interest and attorneys' fees.

IT IS SO ORDERED.

DATED this 20th day of June 1983.

/s/ Owen M. Panner
OWEN M. PANNER
United States District Judge

Richard W. DYKE, dba Western
Stations Co., Plaintiff,

v.

GULF OIL CORPORATION, a Pennsylvania
corporation, Defendant.

COLVIN OIL COMPANY, an Oregon
corporation, Plaintiff,

v.

GULF OIL CORPORATION, a Pennsylvania
corporation, Defendant.

F.O. FLETCHER, INC., dba Fletcher Oil
Company, Plaintiff,

v.

GULF OIL CORPORATION, a Pennsylvania
corporation, Defendant.

Civ. Nos. 77-10-PA, 77-791-PA
and 77-849-PA.

United States District Court,
D. Oregon.

Aug. 23, 1983.

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Neva T. Campbell
Mary E. Egan
Schwabe, Williamson, Wyatt,
Moore & Roberts
Portland, Oregon for plaintiff.

John R. Brooke
Wood, Tatum, Mosser,
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Jack D. Fudge
Michael L. Hickok
Douglas J. Del Tondo
McCutchen, Black, Verleger & Shea
Los Angeles, California for defendant.

PANNER, District Judge.

[1] The remaining issue in these consolidated cases is the award of attorneys' fees. I previously ruled that such an award was appropriate pursuant to section 210(b) of the Economic Stabilization Act, 12 U.S.C. § 1904, note. Defendant argues that a recent decision of the Temporary Emergency Court of Appeals precludes me from awarding attorneys' fees in the circumstances of this case. Although TECA's decision in Eastern Air Lines, Inc. v. Atlantic Richfield, 712 F.2d 1402, (Em. App. 1983), contains strong dicta on the subject, I find the decision is not controlling.

In *Eastern Air Lines*, TECA upheld the decision of a district court *not* to award attorneys' fees. The appeals court based its decision partly on what it regarded as the trial court's "sound application of discretion." *Id.* at 1413. TECA was not required in that opinion to carefully analyze the language of the statute authorizing attorneys' fees. Such an analysis reveals that Congress did not specify that attorneys' fees could only be awarded in cases of intentional overcharges.

The relevant statute provides:

> the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:
>
> (1) an amount not more than three times the amount of the overcharge upon which the action is based, or
>
> (2) not less than $100 or more than $1000;
>
> except that in any case where the defendant establishes that the

> overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge. . . .

12 U.S.C. § 1904 note (1980).

It seems quite clear that the language of exception beginning with the word "except" modifies only the language that follows the word "plus." That is, a court may discretionarily award attorney's fees. In addition, the court may award treble damages or damages in an amount between $100 and $1,000, <u>unless</u> the defendant establishes the overcharge was unintentional and resulted from a bona fide error.

I hold that a reasonable award of attorneys' fees in these cases is $750,000.00.

BACKGROUND

These actions were brought in 1977 against Gulf Oil Corporation ("Gulf") pursuant to the Emergency Petroleum Allocation Act, 15 U.S.C. § 751, <u>et</u> <u>seq.</u> and various U.S. Department of Energy regulations. Plaintiffs sought to recover overcharges for gasoline sold by Gulf. There were years of extensive discovery and pretrial proceedings before the case was set for trial. Because of the complexity of the issues involved, the trial was split into several phases. In phase I, I held that Gulf's method of setting plaintiffs' May 15, 1973 base price was improper. In phase II, I ruled that a reasonable existing May 15, 1973 classification for plaintiffs was the three-tier geographic prices paid by a nonbranded distributor in California. In phase III, I selected the theory and means of calculating plaintiffs'

damages. As a result of that ruling the parties stipulated to an amount of damages of $2,000,000.00 for Dyke, $745,000.00 for Colvin, and $790,000.00 for Fletcher. In phase IV, I held that Fletcher was a real-party-in-interest. Finally, in phase V, I ruled that an award of attorneys' fees in these cases was appropriate. The trial proceedings were spread over a period of seven months.

DISCUSSION

A. Standards.

[2,3] The amount of reasonable attorneys' fees is within the court's discretion. Sapper v. Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir.1983). While the statute is silent on what is "reasonable," many courts have enumerated factors for consideration. The Ninth Circuit has adopted the twelve factors

recited in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974). Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied sub nom., Perkins v. Screen Extras Guild, Inc., 425 U.S. 951, 96 S.Ct. 1726, 58 L.Ed.2d 195 (1976). Although it is not necessary for the court to specifically discuss each factor, Sapper, 704 F.2d at 1073, the court may abuse its discretion in setting fees if it does not at least consider the various factors and discuss the relevant ones. Harmon v. San Diego County, 664 F.2d 770, 772 (9th Cir. 1981); O'Neil v. City of Lake Oswego, 642 F.2d 367, 370 (9th Cir.1981). A court may rely upon a single factor if it appears to be controlling and so long as the remaining factors are considered. Vanelli v. Reynolds School District # 7, 667 F.2d 773, 781 (9th Cir. 1982).

[4] The twelve Johnson factors are: (1) the time and labor required; (2) the

novelty and difficulty of the questions involved; (3) the skill necessary to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relations with the client; and (12) awards in similar cases. Johnson, 488 F.2d at 717-19. To these factors I add another: the attorneys' efforts to bring the matter to a prompt and reasonable conclusion.

Before turning to the relevant factors in these cases I note that this circuit has warned against inflexible application of

the _Johnson_ factors. In _Moore v. Jas. H. Matthews & Co._, 682 F.2d 830 (9th Cir.1982), the court reviewed the "lodestar" method of setting fees utilized in several other circuits. _E.g._, _Copeland v. Marshall_, 641 F.2d 880 (D.C.Cir.1980); _Furtado v. Bishop_, 635 F.2d 915 (1st Cir.1980); _Detroit v. Grinnell Corp._, 560 F.2d 1093 (2d Cir.1977); _Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp._, 487 F.2d 161 (3d Cir.1973). Lodestar analysis involves the calculation of a "lodestar" figure by multiplying the number of attorney hours times the prevailing billing rate for comparable legal services. That lodestar figure is then adjusted based on the quality of work and the risk taken by the attorney. _Moore_, 682 F.2d at 840.

The _Moore_ panel noted with approval the increased use by district courts of a combined _Johnson_ and lodestar approach.

Id. While the technique varies from case to case, this "blended" approach involves use of the lodestar analysis as "a procedure for ordering the examination of [the] factors listed in [Kerr]." Moore, 682 F.2d at 840, citing In re Capital Underwriters, Inc. Securities Litigation, 519 F.Supp. 92, 100 (N.D.Cal.1981), aff'd in part, remanded in part, 705 F.2d 466 (9th Cir.1983), and Knutson v. Daily Review, Inc., 479 F.Supp. 1263, 1270 n. 10 (N.D.Cal.1979). Typically, a court utilizing the blended approach would examine the first element of the lodestar formula, "hours spent," just as it would examine the Johnson element of "time and labor required." The remaining Johnson elements would then be used to determine the second lodestar factor, "hourly rate," and to augment or decrease the overall award based on quality or contingency consideration. Moore, 682 F.2d at 840-41.

[5] While there is obvious merit to this blended method, I prefer not to give undue emphasis to mechanical, mathematical calculations. In most cases, the work product of an attorney is not easily quantified. Use of the Johnson factors to establish the lodestar elements creates the unjustified appearance of reliability and "scientific" methodology. The setting of fees by the district court necessarily requires the use of subjective analysis. Such analysis is imprecise and is therefore entrusted to the discretion of the district court because of that court's intimate knowledge of the proceedings. Hensley v. Eckerhart, ____ U.S. ____, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

[6] The number of hours expended by the attorneys and the prevailing hourly rate must, of course, be examined and considered by the court. I am not required, however, to make precise

calculations on the record. Hensley, 103 S.Ct. at 1940. The requirements established by Kerr can be met by a review of the relevant factors and disclosure of the court's reasoning. Harmon v. San Diego County, 664 F.2d at 772.

B. Application.

1. Time and Labor Required.

These were difficult, complex cases involving an area of the law that has received very little exploration. The "guiding" regulations were often tortuously constructed and contradictory. Combining these circumstances with defendant's aggressive and persistent defense, plaintiffs' attorneys necessarily expended considerable time and effort. Specifically, plaintiffs' attorneys have submitted affidavits showing that they spent 228 hours in trial and approximately 7437 hours in research and nontrial work.

Additionally, they claim 1543 hours of paralegal work.

[7] I find that the submitted attorney hours were reasonably expended in the prosecution of these cases. While I am not bound by the hours claimed by an attorney, e.g., Seymour v. Hull & Moreland Engineering, 605 F.2d 1105, 1117 (9th Cir.1979), I find that the hours claimed here were reasonably within the range of time needed to achieve the successful results. No hours were spent on unrelated claims upon which plaintiffs did not prevail. See Sethy v. Alameda County Water District, 602 F.2d 894, 898 (9th Cir.1979), cert. denied, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980).

[8] I reject, however inclusion of secretarial time within the paralegal classification. The approximately 1000 hours of such secretarial time constitute an overhead expense which is recoverable

only as a part of the attorneys' time. E.g., Kania v. United States, 650 F.2d 264, 269, 227 Ct.Cl. 458, cert. denied, 454 U.S. 895, 102 S.Ct. 393, 70 L.Ed.2d 210 (1981).

2. Novelty and Difficulty of Questions Raised.

[9] These were complex cases that raised significant questions of both law and fact. Novel issues of law were presented. The ever changing regulatory scheme presented an interpretive challenge to both counsel and court. The complexity of these cases support a substantial award of attorneys' fees to the plaintiffs.

3. Skill Necessary to Perform Legal Services Properly.

It is clear that the novelty and difficulty of the questions raised by these cases required commensurate skill and talent.

4. Preclusion of Other Work.

I do not find preclusion of other work to be a significant factor in these cases. Accordingly, I give it no weight.

5. Customary Fee.

Plaintiffs suggest an hourly trial fee ranging from $66 to $165 for the various attorneys. The range for nontrial time is $60 to $150 per hour. Clerk time and other paralegal time is billed at $35 per hour. The suggested ranges reflect the relative value of experienced attorney time in contrast to inexperienced associate time.

The suggested rate structure is higher than fees customarily awarded in this district. The subject matter of these cases justifies higher than usual hourly fees. A survey of awards in this court illustrate the court's general reluctance to award fees in excess of $100 per hour. A substantial portion of these awards were

based on hourly fees ranging from $50 to $80.

Accordingly, I hold that a range of $80 to $100 for all attorney time is appropriate in these cases. Plaintiffs' suggested rate of $35 per hour for paralegal work is within the range of acceptable levels. Considerable expertise was required of the paralegals in these cases.

6. Contingent or Fixed Fee Arrangement.

[10] Plaintiffs' fees were not on a contingent fee basis. Hourly rates were fixed and predetermined. Defendant argues that an award in excess of that actually billed to the plaintiffs is excessive and punitive in nature. I reject that argument. At the time the fee arrangement was made, neither the client nor the attorneys had the opportunity to determine a reasonable fee in light of the various

factors that I can now evaluate. No one could speculate as to the amount of the recovery. It is the court's responsibility to set a reasonable fee award. The statute provides for the award of a reasonable fee, not the fee agreed upon by the parties and their attorneys. _See_ _Johnson_, 488 F.2d at 718 (fee arrangement not decisive in court's determination of reasonable attorney fee award).

7. Time Limitations Imposed by the Client.

I know of no limitations placed upon the attorneys by the clients.

8. Amount of Damages.

Plaintiffs were highly successful. The damages, coupled with the award of prejudgment interest, constitute a substantial figure. The amount recovered, though not bearing directly on the determination of a reasonable attorney fee award, is an important factor in measuring

the effectiveness and competency of the attorneys. The recovery in these cases supports a substantial fee award.

9. Experience, Reputation and Ability of the Attorneys.

Each of plaintiffs' four principal attorneys has demonstrated ability in these cases and in other cases before the court. Lead counsel, Ms. Campbell, has engaged in extensive business and business-related litigation and has particular expertise in Emergency Petroleum Allocation Act litigation.

10. Desirability of the Case.

These cases were not undesirable and therefore this factor is not significant.

11. Nature of Professional Relationship with Client.

Plaintiffs have been represented by these attorneys for a substantial period of time. Dyke has been a client since 1971.

12. Award in Similar Cases.

An award of fees under the Economic Stabilization Act is of first impression in this district. In Evanson v. Union Oil of California, 4 C.C.H. Energy Management ¶ 26,417 (D. Minn. 1980), the court approved a settlement of $2,750,000.00 plus $800,000.00 in attorneys' fees. While there was no discussion of the reasonableness of the fee award, the figures are illustrative of proportional relationship in an overcharge case.

13. Efforts to Bring the Matter to a Prompt and Reasonable Conclusion.

A lawyer has a continuing duty to analyze positions taken and to determine whether they are legally sound. A lawyer must evaluate whether positions are unfairly taken and will unreasonably prolong litigation. The effort a lawyer expends to expeditiously accomplish a

result for the client is an important consideration.

Although resolution of these cases did not come swiftly, plaintiffs' attorneys worked efficiently and expeditiously and in a timely and cooperative manner. Such attributes should be awarded when combined with successful results.

CONCLUSION

I hold that reasonable awards of fees in these cases, allocated pro rata according to plaintiffs' counsels' affidavits of requested fees, are as follows:

Dyke	--	\$385,500
Colvin	--	\$173,500
Fletcher	--	\$191,000

The clerk is directed to enter judgment for these amounts. Plaintiffs shall submit their cost bills to the Clerk.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RICHARD W. DYKE, dba WESTERN STATIONS COMPANY, Plaintiff, v. GULF OIL CORPORATION, a Pennsylvania corporation, Defendant.	Civil No. 77-10PA
COLVIN OIL COMPANY, an Oregon corporation, Plaintiff, v. GULF OIL CORPORATION, a Pennsylvania corporation, Defendant.	Civil No. 77-791PA
F. O. FLETCHER, INC., dba FLETCHER OIL COMPANY, Plaintiff, v. GULF OIL CORPORATION, a Pennsylvania corporation, Defendant.	Civil No. 77-849PA OPINION

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PANNER, Judge:

Plaintiffs brought these actions under the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 751, et seq., which incorporates the private remedy section 210 of the Economic Stabilization Act (ESA) (1970). Plaintiffs seek to recover overcharges in the price of gasoline sold by Gulf in violation of various

regulations. This opinion is limited to the question of which statute of limitations should be applied. I hold that the Oregon six-year statute, Or. Rev. Stat. § 12.080(2), applies.

FACTS AND BACKGROUND

The relevant facts are limited for the issue presented. Dyke, an Oregon resident, purchased most of its gasoline in Oregon and sold it in Oregon. Colvin, an Oregon resident, purchased its gasoline from Gulf in Califronia, transported it to Oregon and sold it in Oregon. Fletcher, a Washington resident, purchased gasoline in Washington (60%) and Oregon (40%), and sold it in Washington. Gulf is a Pennsylvania corporation.

Gulf argues that the applicable statute of limitation for compensatory damages in each respective state are Cal.

Civ. Pr. § 338(1) (three years); Wash. Rev. Code § 12.16.130 (two years); and Or. Rev. Stat. § 12.080(2) (six years). Plaintiffs contend that only Or. Rev. Stat. § 12.080(2) should apply.

DISCUSSION

Neither the EPAA nor section 210 contains a limitation provision. 28 U.S.C. § 2462, the five-year federal limitation statute, for the "enforcement of any civil fine, penalty, or forfeiture," does not apply to actions under EPAA or ESA. Colorado Pet. Products Co. v. Husky Oil Co., 646 F.2d 555, 556 (TECA 1981). In the absence of a statutory limitation period provided by Congress, federal courts are to apply the most analogous state law of limitation. Ashland Oil Co. of California v. Union Oil of California, 567 F.2d 984 (TECA 1977), cert. denied, 435

U.S. 994 (1978). _See also Colorado Pet. Products_, _supra_ and _Shell Oil Co. v. Nelson Oil Co._, 627 F.2d 228, 236 (TECA); _cert. denied_, 449 U.S. 1022 (1980).

A federal court may not mechanically apply a state statute of limitation simply because a limitation period is absent from the federal statute. State legislatures do not set limitation periods with national interests in mind. _Occidental Life Insurance Co. of California v. E.E.O.C._, 432 U.S. 355, 367 (1977). Accordingly, I must be assured that the application of state law will not frustrate or interfere with the implementation of national policy. A state limitation period will not be borrowed if its application would be inconsistent with the underlying policies of the federal legislation. _Occidental_, _supra_ at 367, _citing Johnson v. Railway Express Agency_, 421 U.S. 454 (1975); _Auto_

Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

The nature of the claims presented must first be determined by federal law. E.g., Ashland Oil, supra; Kocolene Oil Corp. v. Ashland Oil Corp., 517 F. Supp. 1029 (S.D. Ohio 1981). Section 210 grants a federal cause of action to any private individual injured as a result of another's violation of the ESA. I hold that the nature of the interests sought to be protected and the general policies of the legislation "dictate that this action be characterized a tort for the purpose of choosing the appropriate statute of limitation." Hyland v. Dennison Mfg. Co., 496 F. Supp. 939, 941 (D. Mass. 1980).

Oregon is committed to the general rule that a forum court utilize its own state's statute of limitation. Forsyth v. Cessna Aircraft Co., 520 F.2d 608, 613 (9th Cir. 1975), citing Conner v. Spencer, 304

F.2d 485 (9th Cir. 1962); *Van Santvoord v. Roethler*, 35 Or. 250, 57 P. 628 (1899). Oregon's "borrowing" statute is Or. Rev. Stat. 12.260. *E.g.*, *Cope v. Anderson*, 331 U.S. 461, 466 (1947). *See also Tomlin v. Boeing*, 650 F.2d 1065, 1068-69 (9th Cir. 1981). It provides that where a cause of action arises between two non-residents in a foreign state, an Oregon court will "borrow" the statute of limitation of the state where the cause of action arose. It is the general view, however, that the foreign statute of limitation is borrowed only to the extent that it shortens the period of limitation of the forum. *Connor v. Spencer*, *supra* at 487.

I note also the modern trend that choice of statutes of limitation should not be handled differently than other choice-of-law problems. *E.g.*, *Tomlin*, *supra* at 1069. Assuming that approach is applicable, I must examine Oregon courts'

choice-of-law decisions in tort actions. Oregon recently abandoned the doctrine lex loci delicti commissi in favor of the "most significant relationship test." Casey v. Manson Construction Co., 247 Or. 274, 428 P.2d 898 (1967). The latter standard was further refined in Erwin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973), and in Tower v. Schwabe, 284 Or. 105, 585 P.2d 662 (1978). An Oregon court will now examine the interests and policies of various jurisdictions to determine if all have a substantial interest in the controversy. A state without an interest in the controversy is eliminated from the choice-of-law decision. If more than one state has a true interest in the controversy, an Oregon court will apply the law of the forum which has the "most significant relationship." Fisher v. Huck, 50 Or. App. 635, 624 P.2d 177 (1981).

Returning now to the facts of this case, I apply the various choice-of-law standards to each plaintiff.

DYKE

Oregon's six-year statute of limitation applies to Dyke's action for compensatory damages. Dyke is an Oregon resident. Most of Dyke's purchases from Gulf were made in Oregon. Oregon's borrowing statute cannot apply since Dyke is a resident. Under Oregon's choice-of-laws analysis, Oregon is the only state with an interest in the controversy. Oregon's six-year limitation is consistent with the federal statutory scheme and national policies. See, U.S. Oil Co. v. Koch Refining Co., 497 F. Supp. 1125, 1131 (E.D. Wis. 1980) (holding that Wisconsin's six-year limitation statute is reasonably

applied to a claim for compensatory damages.

Judge Skopil previously determined that Oregon's three-year limitation period applied to Dyke's claim for treble damages. Use of these two separate periods is not inconsistent with state law or with federal policy. The recovery of exemplary or treble damages is a penalty provision that requires more "stringent proof of additional elements than that warranting the award of merely compensatory relief." Ashland Oil, supra, at 990. See also U.S. Oil Co., supra at 1130.

COLVIN

I hold that Oregon's six-year statute of limitation must also be applied to Colvin's claim for compensatory damages. Colvin is an Oregon resident. Oregon's borrowing statute therefore cannot be

applied. Applying Oregon's choice-of-law standards, California has no real interest in the controversy. California's courts are not burdened with this litigation. No parties reside in California. Under these circumstances, it is unnecessary to reach the second step of applying a "most significant relationship" test. As previously stated, Oregon's six-year limitation period does not conflict with federal statutory schemes or national policy.

FLETCHER

Fletcher's peculiar circumstances make a choice-of-laws decision difficult. In applying Oregon's statute of limitation, Oregon's borrowing statute may apply. Neither Fletcher nor Gulf is a resident of Oregon. There is support for Gulf's position that each transaction involving an

overcharge is a separate statutory tort that gives rise to its own cause of action. E.g., U.S. Oil Co., supra at 1130, citing Jennings Oil v. Mobil Oil, No. 77 Civ. 1398 (HFW) (S.D. N.Y. August 23, 1979) 1979-2 Trade Cases ¶ 62,836. Under that theory, at least the sales made to Fletcher in Washington may be subject to Washington's two-year limitation. Additionally, Washington's two-year limitation statute may be borrowed since it shortens the period of limitation of the forum.

Turning to Oregon's choice-of-law standards, I hold that Washington has no true interest in this controversy. A state legislature sets limitations on damages as part of a total scheme to achieve a desired balance between its policies of compensation and deterrence without placing undue burdens on defendants. Tomlin, supra at 1069-70. Statutes of limitation protect both courts and defendants. Barring stale

claims conserves judicial resources and provides repose to defendants. Id. Here, Washington courts are not involved. The defendant is not a Washington resident. Under the circumstances, I hold that Washington has no true interest and, therefore, I need not apply the "most significant relationship" test.

I decline to apply Washington's two-year limitation period in this case. I hold that a two-year limitation places a bar on recovery inconsistent with federal policy. The federal cause of action created by section 210 was intended to favor private enforcement and surveillance of the price control regulations. The purpose of the Emergency Petroleum Allocation Act is to prevent economic dislocation caused by oil shortages. This is clearly national in scope. Citronelle-Mobil Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala. 1980).

To assure compliance with the pricing regulations, Congress provided a traditional private right of action to discover violators and to deter would-be violators. Kocolene Oil Corp., supra, 517 F. Supp. at 1031. In Ashland Oil, supra 567 F.2d at 991, the Temporary Emergency Court of Appeals held that it would be inconsistent with the underlying policies of section 210 to apply a one-year statute of limitation to an action for compensatory damages. Similarly, in Naph-Sol Refining Co. v. Cities Service Oil Co., 506 F.Supp. 77 (W.D. Mich. 1980), the court held that it would be inconsistent with public policy to apply a two-year statute of limitations to the recovery of compensatory damages. See U.S. Oil Co., supra (rejecting a two-year statute of limitation for compensatory damages and selected a six-year period). Cf. Colorado Pet. Products Co. v. Husky Oil Co., 646 F.2d 555

(TECA 1981) (applying a two-year limitation on claims for treble damages and noting that appellant conceded in the court below and did not argue on appeal whether the claim for actual damages was similarly barred).

I conclude that Washington's two-year limitation statute cannot be applied to Fletcher since it is inconsistent with federal policy. _Occidental Life Insurance Co. v. E.E.O.C._, 432 U.S. 335 (1977); _Ashland Oil_, _supra_ at 989. Furthermore, I decline to apply Oregon's borrowing statute when the foreign state has no interest in the controversy. For reasons specified in _Dyke_ above, I hold that Oregon's six-year limitation statute is consistent with public policy and should be applied to Fletcher.

CONCLUSION

Oregon's statute of limitation, Or. Rev. Stat. § 12.080(2), which provides for a six-year period will be applied in calculating the respective compensatory damages sustained by Dyke, Colvin and Fletcher.

DATED the 8 day of March, 1982.

/s/ Owen M. Panner
Owen M. Panner
United States District Judge